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Indeed, in America, the ban on unfair competition has led to extension of the law protecting trade-marks to cases which in reality do not involve passing-off. Thus, in 1918 the famous decision in *International News Service v. Associated Press,*[2] placed a check upon profits gained solely from the exploitation of work done by others, but not without dissent. In fact, prohibition of unfair competition has not acquired in the United States the same general character as in Europe, but is to be seen in many different guises according to the cases. Thus, in some situations, an action for libel is appropriate, while in others the sole remedy lies in disciplinary action of a spontaneous and cooperative nature instituted by the interested parties through the National Better Business Bureau. There must also be considered the protection of free competition by administrative antitrust authorities and the intervention of the Federal Trade Commission.

It even happens that conduct apparently repugnant to basic commercial propriety, such as advertisements based on disparagement of others' products or their servile imitation (which is the graver in view of the lack of protection of industrial patterns in the United States), are not unanimously condemned by American courts. It may be added that since the notable decision of the Supreme Court in *Erie v. Tompkins* in 1938,[3] holding that in matters reserved to the states, which include commercial competition, the federal courts in diversity of citizenship cases must follow the laws of the state in which action is brought, any possibility of a consistent and uniform development of this branch of jurisprudence has been arrested.

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[1] *Cf.*, W. J. Derenberg, "The Influence of the French Code Civil on the Modern Law of Unfair Competition," 4 this Journal (1955) 1 *et seq.*

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In contrast to this situation, it is interesting to note the radical evolution of the doctrine of unfair competition in European countries. Starting in France as an application of the general principle requiring compensation of damage intentionally or negligently caused (art. 1782 C. Civ.), the concept is now embodied in Article 10 *bis* of the current text of the Paris Convention of 1883 and has been applied in all countries accepting the Convention, giving rise to a line of precedents, essentially the same in all countries concerned.

Article 10 *bis,* introduced into the original text by the revision of the Hague in 1925, reads:

> *"Les pays contractants sont tenus d'assurer aux ressortissants de l'Union une protection effective contre la concurrence déloyale;*
>
> *"Constitue un acte de concurrence déloyale tous acts de concurrence contraire aux usages honnêtes en matière industrielle ou commerciale.*
>
> *"Notamment devront être interdits: 1) tous faits quelconques de nature a créer une confusion par n'importe quel moyen avec les produits d'un concurrent."*

It should be said at once that this article, which is drafted in terms not typical of continental legislative technique, because it contains the determination of a standard rather than an explicit rule, has had exceptionally good fortune and has been reproduced, almost word for word, e.g. in the Italian Code (art. 2598 C.C.).

2. The doctrine of unfair competition appears designed to place limits on uncontrolled freedom of trade competition. According to economists, competition has its own automatic limits. However, there often are rules of law ascribing limits to free competition apart from those natural to competition. All modern provisions of this kind, at least in normal times, while not permitting completely unrestrained freedom of competition, allow at least a large measure of competitive liberty.

Naturally, the different political systems in greater or lesser degree evaluate the respective advantages and disadvantages of free competition; one can thus understand the different limits imposed upon competition in the serious economic crises experienced in the world since the last war. Every country, whatever its political alignment, has generally inclined against free play of competition, by what is now known in Europe, as well as in America, as a controlled or directed economy. This, naturally, does not alter the fact that, however narrow the limits or diverse their forms, the economic principle of competition will continue to operate with its characteristic results. Yet while these limits seem in current legal provisions to be stressed with particular intensity, it should be recalled that, in one form or another, they have always existed.

The limits on free competition which were imposed in the past by positive rules of law, in order to create more or less extensive privileges for some subjects and to prohibit certain industrial activities by others, according to political, ethical, or religious considerations, have definitely been abandoned in modern legislations. The rules of medieval legislation which sought to confine the practice of certain trades to specified guilds, giving those guilds an exclusive "brand," were directed towards the control of legitimate production, and were thus characteristic of laws in restraint of unfettered competition.

Further, if one looks more closely at the principle of "free competition," which, from its early conception by pre-Revolution economists (in France and elsewhere) is said to underlie the modern rules of public and private law since the abolition of the earlier limits on production and commerce in the medieval system, it will be seen that the formula, as it stands in itself, is imprecise and perhaps inaccurate.

What the formula contains and what was postulated by a whole economic movement with the same beginnings as the science of economics, affirmed in the works of the physiocrats, is the abolition of both restrictions and personal privileges in commerce and industry, so that every individual may direct his activities to whatever form of production or exchange he may choose.

Free competition in the modern state therefore has the legal meaning of equal opportunities in all aspects of competition and complete freedom to benefit from its results. But if the abolition of restrictions seemed to those who had suffered them a vindication of economic liberty against the privileges of certain classes, free competition as a legal concept in reality does not mean the affirmation of an absolute and infinite freedom of commercial competition (this would be repugnant to legal principle, which must necessarily limit complete freedom in some degree), so much as an affirmation of the equality of all citizens engaged in production or exchange, equally facing the effects of competition and its limits, be they intrinsic and so natural and unavoidable, or imposed from without, particularly by the sovereign decrees of the state. The principle of free competition does not import a right in the individual to obtain the results of competition without natural limits, (which would be absurd) or without limits imposed by the state, proper to every system of law. It countenances only the legal claim that limits imposed on one competitor will apply to another, so that each can claim in his own interest the observance by others of the same restrictions imposed upon himself. From a legal point of view, therefore, it would be better to speak of *equality* in competition rather than *freedom* of competition.[4]

[4] See Rotondi, "Il valore giuridico del principio della libera concorrenza e l'oggetto della c.d. azione di concorrenza sleale," 2 Studi in onore di Antonio Cicu (Milano,

3. Given this essential premise, it will be profitable to examine the different types of limitations which may be placed on free competition by the laws of the modern state. These limitations may have a dual aim: *the protection of the general interest* and the protection of some *private interest*. The former derive from the mandatory rules of public law imposed by the state; the latter in part from the effects of exclusive rules of the general law upon free disposition by the individual, and in part from the free invention of interested parties.

The limitations of the first group include in particular the administrative rules that by way of exception deny certain categories of citizens the exercise of certain commercial or industrial activities reserving these solely for others (e.g., in consideration of the need for special technical know-how or economic guarantees). Such rules may impose an absolute restriction on account of the dangers of certain processes, or simply require compliance with a standard of safety to be authorized, in order to avoid the possible effects of certain industrial activities on health and the safety of the surroundings. Such rules do not directly limit competition, but indirectly they certainly have a limiting effect.

Other rules prohibit certain industrial activities which the state wishes to preserve as monopolies for itself. Others, temporary or permanent, place limits on specified industries, restrict certain processes, exclude the creation of new plants and new selling organizations, and the like. All these rules, directly or indirectly restraining free competition, are of a public nature. Often they are accompanied by rigorous penal sanctions, thus forming an interesting subject for students of penal law as well as of administrative and financial law.

Likewise, continental writers have given independent consideration to limitations placed on free competition in the interest of individuals. First of all, these derive from the protection of the owner's rights over his business and its constituent elements. Thus, any attempt to strike at such an organization by appropriating or harming its individual elements, e.g., patents, or distinctive signs which are specifically protected, such as the firm name, its stamp or trade-mark, is made illegal.

There are also competitive activities which of themselves would be permitted were it not for voluntary restrictions, such as competition clauses in cartel agreements, which are allowed by continental law within certain limits. If, contrary to such obligations to abstain from competition, (which sometimes are necessarily implied by law in the contract, as in the sale of a business) engaging in the prohibited activity will be considered as "illegal contractual competition."

1951) 327 *et seq.; id.*, "Avviamento et *concurrence déloyale*," 9 Revue Trim. de Droit Commercial (1956) 17 *et seq.; id.*, "Aviamiento y concurrencia (Contribución al estudio de la naturaleza de la acción de concurrencia desleal)," (tr. di M. Falcon) (1957) Revista Jurídica de Cataluña 123 *et seq.*

Moreover, apart from the limits set by law and those voluntarily assumed by contract, others result from the suppression of certain activities, characterized as "unfair competition"; in modern continental law, these activities would be more properly termed "illegal extracontractual competition," which technically is preferable. In effect, continental law, following the French doctrine of extracontractual responsibility for negligence or intent, (art. 1782 C. Com.) which presupposes harm to another's interests and a subjective element of negligence or intent (recognized in the title: "unfair competition") and extends to rivalry between competing business concerns, has gone even further by eliminating some of the basic requirements. The objective need for actual harm has disappeared: it is recognized that an action will lie even if the harm is only potential or possible (e.g., in cases of confusion among products bearing similar trade-names). Even the subjective element clearly recognized in the title of the action (*concurrence déloyale*) is no longer indispensable: an act which is contrary to honest usage is condemned regardless of the subjective condition of the person responsible, i.e., whether or not he intends the act and foresees its consequences. Negligence or intent are relevant considerations only in the judgment and the estimation of damages.

The action of unfair competition therefore no longer, or no longer solely, serves to compensate the damage caused by one competitor to another, but is primarily an action *intended to prevent infringement of the rights of others in general,* to safeguard the competitor through its inhibitory and preventive effect. Compensation is now only an accessory in the action of unfair competition, the chief function of which is to *protect the business organization of a competitor from every attack which might harm it.*

4. Legal writers, observing these developments with approval, have profited from them in the parallel elaboration of a conception of business derived from the traditional Roman concept of *"universitas."* This provides a definition of the legal nature of business, (as in the definition of article 2555 of the Civil Code) which makes a realistic elaboration of the doctrine of unfair competition practicable. Viewed together, the two problems of the nature of business and of unfair competition appear insoluble. The key to these concepts is the notion of *"avviamento,"* which is peculiar to Italian law and is scarcely translatable. The French phrase *"achalandage et clientèle"* is not an adequate rendition; there is no German equivalent, though, indeed, what is termed *"avviamento"* is included in the categories of *"Chancen"* or of *"reine Wirtschaftgüter."* Perhaps, in one aspect, the English *"goodwill"* corresponds to it, but this term also has other implications. Spanish and Portuguese jurists have borrowed the Italian term and use it in its correct significance.

Our lawyers in the middle-ages (like Cardinal De Luca) were not unaware of the phenomenon, and they described it by the term *"avviamentum,"* (*jus intellectuale quod vulgo avviamentum dicitur*).

5. Business economists and accountants have also concerned themselves with the various aspects of *"avviamento"* and give special consideration to it in their reports, speaking of a business as "going" (*"avviato"*) when the capital invested gives a higher return than from a concern giving the mean return of all those in the same field.

Considering the problem in relation to certain concrete questions of substantive law (as the prohibition of future competition in the sale of a business), or *de lege ferenda* (as the various proposals to protect the tenant of commercial property *vis-à-vis* the lessor—the source of the French law protecting "commercial property") it may be argued that the current doctrine in Italy, and even elsewhere, is unnecessarily vague and abstract, impeding a clear view of the essential picture. The Italian concept of *"avviamento"* of some time since, denoted an item of property, albeit an immaterial one—one of many that combine to form a business. More extensive study leads to different conclusions. Even admitting—as is conceded by the Italian doctrine—the existence of "immaterial" items of property, where there is property there must be an entity capable of enjoyment and disposition: the property for example will be a patented invention or the artist's conceptions which the law recognizes as belonging to him exclusively, because the author and the inventor can dispose of this right, and of the values which they represent, without any material item entering into the transaction; thus one can alienate his rights as author without parting with the manuscript or a copy of the printed work.

None of these conditions applies in the case of *"avviamento,"* which represents the possibility of future profits depending on the organization of the productive elements in the business; it is not a separate concrete element, but something realized by the organization, which, when in existence, confers on other factors the ability to produce new wealth and new values.

This understood, it is clear that *"avviamento"* is not a concrete item but an abstract quality, a value, which has become part of a business organization, and derives partly from objective elements (*avviamento oggettivo*) and in part from the management of business (*avviamento soggetivo*).[5]

[5] See Rotondi, "Studi sull 'avviamento," 26 Riv. Dir. Comm. (1928) 277 *et seq.; id.*, "La notion juridique de l'achalandage," 39 Annales de droit commercial (1930) 30 *et seq.; id.*, "Considerazioni in tema di avviamento e dei criteri di valutazione di esso ai fini del risarcimento del danno," 9 Riv. di Diritto Privato (1939) 201 *et seq.; id.*, "El aviamiento en la teoria general del fondo de comercio," (trad. G. Deveali) 51 Le Ley (1948) 1127 *et seq.; id.*, "Progetti e discussioni per la tutela della c.d. proprietà commerciale in Italia," 49 Riv. Dir. Comm. (1951) 328 *et seq.; id.*, "Les projets et discussions relatifs à la protection de la prétendue 'propriété commerciale' en Italie," 7 Travaux de

This concept allows a new view of the theory of business.[6] It is neither a juridical person, as stated in the older German theory of Hassenpflug, Gelpecke, Endemann, A. Mommsen, and ultimately of Valery himself, nor an autonomous patrimony devoted to a purpose (*patrimoine d'affectation:* Bekker's *Zweckvermögen*) nor a mixture of material and immaterial things, as envisaged by the dominant Italian doctrine in a purely atomistic conception, (Scialoja, Barassi) nor an abstract entity as in the conceptions of Isay, Müller Erzbach, and Pisko, nor a legal transaction, as Carrara maintained. Business represents, rather, a new application of the old notion of *"universitas"* in Roman law and in the continental systems based upon it. It is a combination of things organized toward a common end of production, which, due to the very influence of the organization creates a new value: that of *"avviamento."* The law protects this new value added to the individual elements of the business against external interference; *this protection is properly constituted through the action for unfair competition.*

This is a new remedy that encompasses the business, quite different and apart from those which safeguard its component elements, whether material, immaterial, mobile, immobile, machines, patents, or any other class. It affords relief separate from but complementary to the actions for infringement of patents and trade-marks, because it is general and embraces the whole of a business.

The action for unfair competition, which protects the whole of a business like a moat or palisade around a fortress, treats the business for that reason as a single unified entity. It provides the rational basis for construing business as *"universitas."* This is the conception which the author has illustrated in various writings over the last five or ten years; it has been widely accepted in Italian jurisprudence and is defined in Article 2555 of the Italian Code, which affirms the organic and unitary nature of business: *"L'azienda è il complesso dei beni organizzati dall' imprenditore per l'esercizio dell' impresa."*

6. It would be inappropriate here to dwell upon the practical applications appearing as corollaries of the concepts of *"avviamento,"* or of "business," which are expounded above. Yet it is of interest to

l'Association Capitant (1952) 93 *et seq.; id.,* "O aviamento na teoria general do estabelicimento mercantil," Jornal do Fôro (1956) p. 98 *et seq., id.,* "Effectos de la venta de la hacienda mercantil sobre las deudas y los créditos," Revista de Derecho Privado (1957) 735, *et seq.*

[6] See Rotondi, "La nozione giuridica dell azienda," 28 Riv. Dir. Comm. (1930) 155 *et seq.; id.,* "Théorie générale du fond de commerce," 3 Travaux et Conférences de l'Université Libre de Bruxelles, Faculté de Droit (1955) 5; *id.,* "Ein System des gewerblichen Rechts," 118 Zeitschr. für das gesamte Handelsrecht (1955) 57 *et seq.; id.,* "For the creation of a system of industrial law," (trad. L. Oppenheim) Tulane Law Review (1956) 539 *et seq.; id.,* "Per un sistema di diritto industriale," 54 Riv. Comm. (1956) 1 *et seq.; id.,* "Droit industriel et théorie générale du fond de commerce," 15 Annales de droit et de sciences politiques (University of Louvain, 1955) 125 *et seq.*

note from the theoretical standpoint that the action for unfair competition is accompanied by a sound background in the conceptual field of jurisprudence.

Continental law has long been asking what is the object of the action for unfair competition. This, it may be answered is *protection of "avviamento,"* the value which derives from the business organization, which exists in every business by the very fact of its organization, and which endures so long as the business exists. Moreover, although the many attempts to classify the innumerable facets of unfair competition, from Kohler onwards, have produced no stable results, the present conception offers a criterion to classify situations in which a business organization and the value of the *"avviamento"* are attacked by the activity of a competitor, either internally by disrupting the business organization or externally by alienating its clientele.

On this basis, we may set in order the exceptionally varied and rich line of cases presented by the Continental, and especially the Italian, legal systems.[7]

A. First, acts of unfair competition which harm the *"avviamento,"* operating internally within the business:

(a) A widespread form of unfair competition results from the discovery or unlicensed exploitation of *industrial or commercial secrets.* Such conduct involves more than the revelation or wrongful appropriation of a new invention, as yet unpatented, either in order to acquire a patent or, intentionally or not, to place the secret forever within the public domain—the consequences may be much graver. Indeed, the economic implications of the violation of a secret may matter more than the content of the secret as such. Therefore, one must consider *commercial secrets* as well as industrial secrets.

Such secrets include not only work processes which cannot be patented, or particular *"tours de main"* permitting certain delicate operations, which are jealously guarded by certain firms or technicians, but also lists or categories of clients, with their special requirements, and the like.

Second, respect for the secret imposes an obligation on those engaged on work relating to it for the whole length of their employment and even after its termination. Article 2105 of the Italian Civil Code forbids subordinates "to divulge information relating to the organization or

[7] See Rotondi, "Per una classificazione degli atti di concorrenza sleale," Aequitas und bona fides; Festgabe zum 70. Geburtstag von August Simonius (Basel, 1955) 307; *id.*, "Le varie forme di lesione dell'avviamento come criterio di classificazione degli atti di concorrenza sleale," 54 Riv. Dir. Comm. (1956) 337 *et seq., id.*, "Como classificar los actos de competencia desleal," (tr. M. Olivencia Ruiz) 21 Rev. de Derecho Mercantil (1956) 261 *et seq.; id.*, "Das 'Avviamento' als das Schutzobjekt der Klage als Kriterium für die Einteilung der unlauteren Wettbewerbshandlungen," Auslands- und Internationaler Teil zu Gewerblicher Rechtsschutz und Urheberrecht (1956) 531 *et seq.*

methods of production of the enterprise or to make use thereof in a manner that may prejudice it."

Third, for the purposes of the action, it is quite immaterial whether the secret which is abused is directly stolen by someone concerned with it, or has been acquired through third parties. In the latter case, in view of the bad faith of the third party, he is subject to the further liability which will be judged most seriously, on account of incitation to reveal the secret.

Fourth, an act of unfair competition through the abuse of secrets may occur whether knowledge of the secret has been acquired from association with the specific activity in a determined business or from an independent source. Thus, the normal penalties apply in cases where the violator has acquired the secret "by reason of his status or office, or of his profession or craft," or which come within Article 2105 of the Civil Code for subsidiary workers.

Among all the cases, there are instances which are certainly illegal, others which are subject to question. There is no doubt that commercial espionage is illegal when it is aimed at discovering the clientele of a competitor, or the clients' special requirements, or the special lines that they buy, etc. (all matters that are treated with particular reserve by the interested party). Yet any such information may sometimes be revealed by independent events, or communicated by persons with no obligation of nondisclosure, and then there is no question of illegality. Only by studying the facts of each case can one determine its legality or illegality.

Certain activities may become illegal only in their extreme applications. Cases in point are the competitor who observes the calls of another's salesmen and carriers, or who mounts pickets outside another's premises, or boosts his own wares in front of another's stand at a trade exhibition, or who seeks out the requirements of specific clients so as to attract them to himself, or who seeks to procure another's recipe with the sole intent of surpassing it with his own product: these are types of conduct that are manifestly improper and illegal.

It is noteworthy too that an act of unfair competition does not presuppose an illicit motive. Some may be illicit whoever performs them and with whatever intention; others may simply be illicit in substance because their form, means, or motives are not in accord with normal correct commercial procedure (see Article 10 *bis* of the Paris Convention).

(b) A special form of unfair competition within the first category is *incitement to break, or the voluntary co-operation in breaking, a contractual relation, which results in damage to a competitor.*

There are many examples: encouragement to violate the obligation which a trade secret imposes upon certain persons (as described above);

incitement of another to break a clause of noncompetition; voluntary participation in such a breach; incitement or voluntary participation in violating the obligation of a trader to assure exclusive rights to his goods or to furnish determined periodic supplies to a particular business.

The most frequent example is the so-called solicitation of labor, where employment is offered in order to entice valuable workers away from a competitor's business to one's own. It is obvious that this maneuver may harm a competitor, especially when specialized craftsmen or employees of outstanding ability are concerned. The principle of free offer and acceptance of work, which with the improvement of economic conditions promotes the living standard of manual and clerical workers, does not include an activity designed to alienate workers, who are bound by agreement, from one business to another.

Such enticement does not necessarily involve the elements of eliciting trade secrets from the former employee, or creating confusion in the mind of the public between two businesses, nor, it is submitted, a breach of contract, which in itself would be wrongful—although all these elements may well be presented in this form of competition. In certain circumstances, even a normal unilateral resignation on the part of employees, induced by the maneuvers of a competitor, may suffice to constitute activity "contrary to honest commercial usage," and as such to be classed as unfair competition.

Perhaps the most obvious application is an attempt to cause the breach of a contract in being, but it is not the most frequent. If only from the standpoint of prudence, the competitor often is willing to wait for one or more employees to defect to him at some indeterminate time in the future, respecting all obligations with regard to giving notice. Even if the employee is not guilty of misconduct, it does not mean that the competitor's tactics are permissible, when designed to attract collaborators to whom he is not entitled. Their illegality does not lie necessarily in accepting an employee who abandons a competitor, whether with knowledge of his antecedents or not, even perhaps on the same conditions of service, nor in attracting a good man with a reasonable offer of better terms of employment—some ulterior element vitiating such conduct is essential, involving intentional prejudice to a competitor's business and not simply improvement of one's own.

Nevertheless, when the subordinate originates the breach of contract in an unjustified or untimely manner, he himself is answerable for such illicit act, while the person who benefits, who may have directly influenced it or knowingly favored it, is also answerable for unfair competition. Generally, where an employee breaches his contract to transfer to a competitor and the latter's incitement or co-operation in the breach involves unfair competition, the responsibility of the competitor exists alongside that of the defaulting employee.

There is no lack of legislation to impeach this form of illicit conduct. The French Penal Code in Article 417 even imposes penal sanctions on it. Our courts quite often have had recourse with precise judgment to the general principle of extracontractual liability.

The importance of the principle is appreciated when one considers that the employee who breaks his contract is often "a man of straw." Of the two responsible—the workman who goes to a competitor and the competitor who welcomes him—it is the latter who can provide better satisfaction for compensation in damages.

(c) A form of unfair competition which only recently has been debated is that involving so-called "servile imitation" of products that have not been patented. By servile imitation (the German *sklavischer Nachbau*) in its most narrow technical sense, is meant the slavish and almost mechanical reproduction of another's products, independently of any violation of patent right.

If the product has features making it patentable, or if it qualifies for the protection afforded to industrial designs or models, it enjoys legal protection to guarantee its enjoyment as a monopoly. But as surely as its reproduction is actionable, this kind of counterfeiting does not belong to the proper concept of unfair competition. Even referring to "servile imitation" in its narrowest sense, not only do we mean to exclude this, but we also rule out copying the external features of the product, which is generally recognized as constituting an act of unfair competition in so far as it creates confusion between two rival products. Associated acts, likely to cause confusion, will equally be repressed, such as making a product of similar appearance or using similar external marks or distinctive signs, or uttering a false advertisement, or acting in any of the various ways which it is proposed to examine below. Here, the main problem with which we are concerned is whether, apart from confusion of products, "servile imitation" will be suppressed on its own account as a form of exploitation of another's work, aimed at creating a product which is not covered by patent rights.[8] Naturally,

[8] On "servile imitation" see: Parrella, "Il divieto di copia servile nel sistema di difesa proprietà industriale," Studi in onore di Mariano d'Amelio (Roma, 1933) 17; Piola Caselli, "Le cosidette imitazioni servili nel sistema di protezione della proprietà intellettuale," 7 Annuario dell'Istituto di Diritto Comparato e di Studi Legislativi (1932) 269; Piola Caselli, "Questioni in tema di licenze d'esercizio di brevetti, di concorrenza sleale per imitazione servile, di prova di attuazione del brevetto," 1938 Giurisp. It., I, 433; Rotondi, "L'imitazione servile come atto di sleale concorrenza," 8 Riv. Dir. Priv. (1938) and 45 Revista de Facultade de direito (São Paulo, 1950) 160; *id.*, Diritto industriale (4th ed., Milano, 1942) 434; Messineo, "Imitazione del prodotto altrui e concorrenza illecita," 1938 Foro Lomb. I 63; La Lumia, "Diritti sui beni immateriali e prescrizione acquisitiva," "Imitazione servile e concorrenza illecita," 1938 Foro It., I, 435; Goldschmidt, "Sulla concorrenza sleale per imitazione servile," 8 Riv. Dir. Priv. (1938) 1; Auletta, in Comm. Cod. Civ. (Scialoja e Branca) Libro V, Del Lavoro (Roma, 1954) 346; Ferrara, Teoria giuridica dell'azienda (Firenze, 1949) 316; Isay, "Der Nachbau patentfreier Maschinen," Gewerblicher Rechtschutz und Urheberrecht (1926) 83; Reimer, 2 Wettbewerbs- und Warenzeichenrecht (1935) 523, 638; Callmann, Der unlautere Wettbewerb (Berlin, 1929) 27, 47, note 53, 120 *et seq.*

the product imitated must be one that is not common or the result of ordinary technical construction. But with this proviso, the problem is full of interest, even from the practical point of view.

The field in which this form of competition appears is particularly that of mechanical construction. Even the layman can guess (and the technician will appreciate more profoundly) what labor, expense, and materials are needed to produce a complex mechanical contrivance. All these values are clearly differentiated and form the production cost of the prototype upon which the standardized product will be based in mass production. It is entirely possible that the resultant product will not be of a type that can be patented or will be protected by the law on new designs or industrial models, even taking into account the many different devices employed throughout the experimental stages to produce the most suitable final product, devices applying to the individual constituents, to their combination in the final product, and even (in metallurgy) to the chemical composition of the separate constituent elements. One calls to mind, for instance, the launching of a new automobile, even if it is not presented as a new patentable invention or one that may be protected as a new model, (for which a law may sometimes exist). The finished product cannot be patented; only parts may be newly modelled or designed, such as the coachwork or individual accessories; and yet the whole represents much hard work and expensive engineering skill and has an indisputable organic unity. It is clear that, if it were possible for a competitor to reproduce such a model without the first initial outlay and labor, he would find himself in a highly favorable position compared with his rival who has had to bear the development costs. It is also clear that such imitation on the part of the competitor may occur under conditions which avoid confusion of product or producer, (in which case the illegality of the competition would be obvious) but it may be nonetheless harmful, for the purchaser, even if he knows of the different origins of two products substantially identical, will choose the one most advantageous to him, which, in view of the imitator's lower production costs, will be his product. But, simply because the chance of confusion is ruled out, can such slavish imitation of another's product be considered unfair competition?

The solution is keenly controversial.

Foreign jurisprudence—particularly in Germany where the question is most often posed—offers a variety of solutions. Italian law, which at times in the past treated this activity as illegal,[9] is prevalently influenced by some decisions of the Supreme Court,[10] which exclude

[9] See App. Genova, 7 July 1937, in Riv. Dir. Priv. (1938, II) 1.

[10] See Cass. 10 May, 1938, Cohen v. Moncenisio, in 8 Riv. Dir. Priv. (1938) II 89; 10 May, 1938, Rolando v. Van Berkel, in 1938 Foro It. I 812.

this category in applying sanctions against unfair competition. Hence, some argue that imitation, if it is repressed, is not repressed as such, but only on account of the confusion it may cause, or where it is associated with fraudulent dealings, such as the violation of secrets.

It is submitted that such a negative solution, while authoritatively supported by some authors,[11] nevertheless is not to be shared.[12] We hold that, considering the general characteristics of fair competition, (honest use of the materials of industry and commerce) such imitation should be repressed as being typically repugnant to commercial honesty; it is a shameless abuse of the results of another's work and expenditure to manufacture and sell a simple reproduction of what he has created and been unable to patent. The legal conclusion to the contrary (apart from the theory behind it) seems to be doubly at fault. First, it holds that as Article 10 *bis* of the Convention expressly impeaches imitation in relation to the confusion, it follows that imitation by itself will always be lawful. Secondly, it holds that our theory would put patented and unpatented products on an equal footing and the resulting monopolies would impede the free progress of industry. Now one must remark that, because Article 10 *bis* in its list of examples represses imitation of another's products when it is likely to cause confusion, it does not mean that imitation will always be lawful when there is no question of confusion, especially as the final result is always the same: harm to the *"avviamento."*

It is not contested that where there is no patent right, an imitation, as it stands, is lawful, but in questions of unfair competition, one must always consider the surrounding circumstances of forms and means; if the ultimate criterion is that of the honest businessman, it seems difficult to hold that a person of such character would have recourse to exploiting the work of others, which, apart from the hypothesis of confusion, is the essential characteristic of "servile imitation."

Nor should one say that patented and unpatented products would be placed upon the same footing. From one point of view, the repression of "servile imitation" would be more rigorous than breach of patent right, because the former is unlimited in time, whereas the latter is confined to the period of its certificate's validity.[13] The objection is groundless, however, because there are grave civil and penal sanctions against the infringement of a patent right, whereas an unpatented product has no other defense—apart from the repression of "servile imitation"—except where there is proof of a fully voluntary

[11] See Piola Caselli, *op. cit., supra* n. 8, 433; Messineo, *op. cit. supra* n. 8, 63; Ghiron, Corso di diritto industriale (Roma, 1935) 91; La Lumia, *op. cit. supra* n. 8, 441 *et seq.*

[12] See Piola Caselli, *ibid.*

[13] See Rotondi, "Il valore giuridico del principio della libera concorrenza e l'oggetto della c.d. azione di concorrenza sleale," 2 Studi in onore di Antonio Cicu (Milano, 1951) 327 *et. seq.*

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and intentional appropriation of the result of another's work and expenditure.

To resort to a traditional athletic metaphor so often used when speaking of business competition, it may be said that in a free race in which rivals engage to secure market and customers, patent rights bar the way to everyone but the holder of the patent, but where there is no patent, the road is freely open to all contestants, provided that each uses his own powers and is not to be impeded or spurred on by the others. Evidently, there is therefore no question of frustrating or limiting free industrial progress, as some seem to fear, because slavish reproduction of another's labors, without conscience and without inspiration, has never been regarded as progress. It must be maintained, consequently, that "servile imitation," even where there is no question of creating confusion about the origin of a product, should be considered unlawful as "contrary to the honest usages of industry" (Article 10 *bis* of the Convention).

B. Acts of unfair competition which harm the *"avviamento"* of *business externally:*

(a) An important category of acts of unfair competition of this type includes acts calculated to create *confusion between traders, businesses, factories, and products.* This is one of the most frequent forms in which unfair competition occurs: it has a rich case-history in the legal system of every European country.

There can be no question of the illegality of this form of competition. There is no exclusive right to retain one's own clientele, even less to extend a complete shield over every subjective and objective aspect of the *"avviamento"* of the business, but every trader has the right to see that his clientele, whether actual or potential, is not led astray by means calculated to cause confusion respecting the identity of the trader, his business, his works, or his products.

It is worthwhile here to note the distinction between acts harming the subjective *"avviamento"* (confusion between traders or producers) and those harming the objective *"avviamento"* (confusion between businesses, works, and products).[14]

At the same time, it must be repeated that this form of illegality does not concern the harm done to single elements or distinctive signs of the business which are specifically protected, such as the trade-mark, for this would constitute forgery, not unfair competition.

Thus, in all the cases to be examined, in accordance with the general principles already set out, the illegality does not require intentional imitation, or tactics directed towards creating confusion. It is sufficient

[14] It is now accepted without discussion by our courts that relief against unfair competition should be made available to prevent activities prejudicial to one's business, quite independently of actual damage or the psychological intent of the competitor, rather than to recover damages on a tort theory as in the less advanced case law of France.

that there is a possibility of confusion, however brought about, which, when he notices it, the honest trader is bound to terminate. If he persists and profits from the confusion, he will be liable. The subjective elements of fraud and culpability will be relevant in settling the damages, but need not be considered in establishing the right to an action for unfair competition;[15] this action can be maintained solely for damages, but it is also a means of defense, a safeguard against future harm, and is designed to end a state of danger to the *"avviamento"* of the business.

In reviewing the principal types of acts in this category, let us deal first with those which may cause confusion between the identities of competing traders, (damage to the subjective *"avviamento"*). This class includes the adoption of the same name or one similar to the rival's, as well as of personal emblems which might be mistaken as the other's, in competitive activities and the presentation of products. More easily, accidental or intentional similarity of trade-names (meaning the objective denomination of the business,[16] referred to below) may cause confusion, but even similarity of the traders' actual names may do so. Thus, one's own name might even be accompanied by an irreproachable trade-name and yet create confusion, because of its similarity to that of some famous namesake who has given his name to a well-known rival business.

Again, there are the acts which cause confusion between businesses, works, or products (damage to the objective *"avviamento"*). Confusion between businesses may result from false indication of origin, or imitation of distinctive marks which have not been registered as trademarks (so as to make their infringement a forgery) or imitation of the signs and external features of a shop, or copies and imitations of price-lists, misleading advertisements, and, above all, piracy of the style of a business name. Although the last is not the object of an autonomous right, and even less a right of property,[17] it may still be held that any form of imitation of another's style, constitutes an act of unfair competition. We will not repeat here what has been stated elsewhere[18] with regard to trade styles, how one is obliged to distinguish one's style from a competitor's, even when the similarity is not intentionally caused, but is due to the surnames of two competitors being the same.

Finally, there are all the acts calculated to create confusion between

[15] I have had some occasion to deal with the subject in the past; see "Per una precisazione del concetto di ditta," Monitore dei Tribunali (1930)3.

[16] See Rotondi, Diritto Industriale (4th ed., Milano, 1942) 65 *et seq.*

[17] The works cited in the footnotes above deal more fully with this topic.

[18] See Kohler, Autorrecht (1889) 132 *et seq.*; *id.*, "Recht an Zeitungstitel," Oesterr. Centralblatt für Juristische Praxis (1886) 730; Pouillet, Traité des marques de fabrique (Paris, 1898) 631; Ramella, I giornali e la legge commerciale (1897) 656; Giannini, Concorrenza sleale (1898) 49; Ebner, "Urheberrechtsschutze des Titels," Gewerbl. Rechtsschutz (1925) 8.

products. The numerous cases range from imitation of a product's distinctive stamp which has not yet been registered as a trade-mark, which would be considered unlawful whether the name is fictitious and not descriptive of a product or the more so if it is the necessary name of a product, to the reproduction of numbers and abbreviations with which the competitor designates his types of products, and the use of labels, packages, and containers resembling those of the competitor.

In these matters, legal principles have been laid down for guidance. One must consider the whole appearance of the competing products, starting with the obvious principle that to create a possibility of confusion there must be some misleading similarity in a feature which is distinctive and not in common general use. Also, confusion must be measured by different standards than those applicable to abuse of registered trade-marks (a distinction fundamental to continental codes). A balance should be struck between the similar features and those which are different, because even objective similarity and intentional imitation of certain external characteristics do not constitute unfair competition, so long as confusion is unlikely after consideration of all the external features. Nevertheless, in judging the likelihood of confusion due to the visual aspect of the product, it is clear that, taking all things related to the product into consideration, mere similarity of name may suffice to cause confusion, for the product may be ordered without examination of a sample and likewise, when it goes under a deceptive similar name, it may be thought that the product desired is obtained, though presented in modified form.

Naturally, the nature of the product and the public for which it is destined may often be relevant considerations, for the standards applicable to widespread products, which are cheap and commonly used and which an uneducated purchaser often may obtain without weighing the differences between products, are different from those destined for a specialized public who do not buy without the most scrupulous consideration. A class of unfair competition in this category, of special importance to publishing houses and the periodical press, is furnished by reproductions of the title or outward characteristics of a periodical. Even where the title of a literary work or review is not a subject of copyright, and may not even be original, it will be protected against the danger of confusion with titles of other newspapers or other reviews. This is even more important as the author's copyright is limited in time, while the importance of a title increases with the antiquity of the publication to which it belongs. Indeed, where cases of copyright infringement and unfair competition occur together, greater importance is given to the latter;[19] thus, in German law and in other

[19] See Cass. 20 Dec. 1937, 1937 Foro It., I, 563.

systems dealing with unfair competition, special rules deal with this form of liability.

Still referring to matters of publication, confusion may be caused not only by similarity of title, but also by similarly colored paper on which the publication is printed, the arrangement of pages, the peculiar characteristics of the illustrations, and the like. Here also must be counted the reproduction (which may be a simple mechanical process by an electro-dynamic method) of a font of type manufactured and distributed by a competitor.[20] In fact, this might be thought of as a typical form of "servile imitation" in a technical sense, apart from any question of confusion. In reality, whoever acquires the type of the originator can rarely have any doubts about its origin; for this reason our case law has placed this construction on the case in order to repress scandalous abuse, without admitting that "servile imitation" as such in its technical sense should be sanctioned.

(b) The second category of acts harming the *"avviamento"* from without is constituted by *acts directed at diminishing the credit and clientèle of a competitor by denigration of his character or his business or product.* This is a particularly delicate field, especially when it is appreciated that denigration in the form of the publication of untruths is not an indispensable prerequisite of the illegality. Here it is possible to distinguish three different hypotheses: affirmation of untruths likely to harm the *"avviamento"* of a competitor; comparisons between one's own productive organization and products and those of the competitor, reflecting discreditably on the latter; and, finally, the revelation of facts, which on their face are true, but may yet throw discredit on a competitor.

The first instance occurs by declaring untruthfully that the competitor's products have certain defects or lack certain essentials, or that his business is in a bad state, or that he has been declared bankrupt, or that his organization is technically, commercially, or otherwise deficient. From the above examples, it can be seen that the denigration may affect either the business competitor or his organization, and thus may cause damage to either the subjective or the objective *"avviamento."*[21]

The second class includes situations where one competitor refers to another or his product as being inferior. Thus, he might say that his own product is more resistant than some other specifically indicated. Similarly, he might claim the attainment of personal recognition or industrial attributes that in fact belong to other firms or other persons, e.g., that he was the victor in a competition or race won by another. This has an even more harmful aspect than the simple boast of non-

[20] See *supra nota* 12.

[21] See Barassi, 2 Il contratto di lavoro (Milano, 1915) 59.

existent qualities. An act is illegal when liable to create confusion, as shown above, but it is clear that when, for example, a person wrongfully claims to have been the winner in a race for two, apart from the danger of confusion—and even without it—there is an unjust and unfair comparison of respective abilities.

Finally, we come to the cases where a competitor publishes obvious and well-known facts but in such a way as to discredit the person, the business, or the product of his rival. Thus he may state quite truthfully that his competitor has once been declared bankrupt or has been prosecuted, or that his product has met with difficulties, or has shown itself to be of poor quality, or has been rejected as being of low standard or because of manufacturing faults, etc.

In each of the three classes under the general heading of denigration, a few remarks are pertinent. In the first example—denigration by publication of untruths—academic and practical law agree on its illegality. The act is forbidden as such and, apart from any question of unfair competition, it may give rise to civil and penal sanctions, whereas, in relation to business competition, it clearly qualifies as unfair competition. In the second case, the continental codes, as well as the continental jurists, are generally rigorous in suppressing as unfair competition reference to the person, business, or product of a competitor, whether indicated by name or by inference in such a way as to emphasize the superiority of one's own business or product. The decisions in point are generally classified as *"références comparandi causa."*

However, it might be felt here that an investigation in each case to determine whether, according to all the circumstances, it conforms or not to correct commercial usage might not be wasted; here perhaps the zeal of continental law may even have exceeded on occasion the limits of justice. On the other hand, in considering boasts intended to praise one's own wares, references *comparandi causa* should be treated more harshly, it is submitted, than references to objective elements, provided always that what is said is true. Yet this distinction is not unanimously accepted, so that while it appears fair and reasonable, it need not be insisted upon.

An indefinite, general assertion of the superiority of one's own product as opposed to that of a competitor, whether named or implied, made with a view to wide publicity, simply because it can scarcely be challenged in an objective manner, may create an atmosphere of distrust for the product marked out as inferior, and therefore such a course would be inconsistent with correct commercial usage. Yet, when one objectively selects certain characteristics so as to demonstrate the quality and merits of one's own products, it may be necessary also to make a perfectly honest and objective appraisal of a competitor's prod-

uct. This may be done in such a way that every such reference should not be classified as illegal. One may imagine, for example, the publicity given to the result obtained in clinical tests by certain drugs. Here it would be difficult, especially if the publication is made to a discerning, unbiased audience, to assume that any comparison which is conclusive in favor of one's own product, is unlawful. For the rest, there are many instances where comparative reference is universally accepted as legitimate, e.g., the publicity given to sporting events in order to illustrate the pre-eminence of a certain vehicle which has won or been among the leaders, or the quality of its construction, its tires, its fuel, etc. In referring to the placings made by the judges, and the times recorded for individual machines and competitors, there undoubtedly may be favorable comparison of one's own products with the others. The same is true of the placings in a public contest or the prizes gained in a public exhibition. In every such case, there is no doubt of the lawfulness of the comparisons or of the publication of the successive placings, although they indicate the excellence of certain products or competitors. Indeed, this is a useful function of public contests, for by their means it is possible to evaluate the relative success of competitors in achieving a position of excellence or pre-eminence.

The remaining hypothesis is the one which gives rise to the greatest doubts and controversies. Should it be permitted in the course of commercial competition to divulge facts that are likely to discredit a competitor or his product? There have been many answers, and the tendency has been towards greater severity; in the last revision of the Paris International Convention in 1934 in London, it was even suggested by some that there should be a general legal sanction against such publication.

It is felt that the problem should be tackled with the greatest circumspection. While it is true that the dissemination of untruths to discredit a competitor is necessarily illegal, to hold that the circulation of harmful statements, even if objectively true, should also be illegal would be dangerous and often unjust. Consequently, it is felt that any sanction by legislation or convention in such general terms would also be most perilous.

A fairer method than making an objective general classification to discriminate instances, would be to refer to every relevant circumstance in each case to determine whether the behavior in question conforms or not to accepted standards of commercial usage.

With respect to the propriety of divulging facts which reflect to another's discredit, there are cases which fall on each side of the line. A problem which has exercised Italian law is that of the competitor who says that a rival is of foreign origin, or worse still, of enemy nationality. If untrue, the act is clearly wrong, but it does not follow

that if true it will be permitted, so that the public may give preference to a native product. Such a consideration does not justify an exhortation to the public to boycott a foreign product simply because it is foreign, nor can any such inducement be considered commercially proper. It is the duty of the state to make such provisions with regard to the affairs of enemy aliens as are necessary, but it is not proper for an individual to initiate a boycott of an alien concern solely for his own advantage.

Equally, we do not hesitate to adjudge as improper any publicity given to a competitor's past prosecutions, or his past failures or bankruptcies as owner or director of rival organizations. The misfortunes, errors, even past misdemeanors, of a competitor are more appropriate to common gossip than to free lawful business competition, and the employment of such means to widen one's own clientele would not be consistent with correct commercial usage.

(c) A further category of unfair competition consists of *the boastful inflation of the genuine industrial or commercial merits of one's business or product, or of oneself as their producer and vendor.*

The spread of the forms of commercial publicity has opened a whole new field in which unfair competition may occur.

In considering this field, it is proposed to ignore exaggerations and to begin with a few basic premises, bearing in mind that the subject deals with the protection of competitors against unfair business competition, and not of the public consumer. If the consumer is mistaken or has been deceived, he will be protected by the branch of continental law based on lack of consent in contract, to which may be added penal sanctions where there is deceit or fraud. With this aspect we are not here concerned, our sole problem being that of unfair competition; in short, this is whether a competitor may bring an action to restrain such advertisements, and be recompensed for damages which are difficult to prove. It should be added that the simple truthfulness of the claim is not a good criterion upon which to base the legality of this form of competition, for the assertions in question are more often vague, subjective, and arguable, than objective statements which may easily be verified or disproved. Untruths likely to interfere with fair competition will clearly constitute unfair competition, but the indefinite claims which depend only on subjective appraisal present a more difficult problem and can only be assessed against a general standard of correct and honest commercial behavior. Naturally, this does not take into account the existence of specific rules in individual codes or international conventions, e.g., the special convention stipulated at Madrid during the revision of the Paris Convention in 1891 dealing with false indications of origin.

Among the claims which, being capable of disproof, create liability

for unfair competition, we may note the unjustified claim of a trader to be the inventor of a product, or to have his product covered by a patent (a misrepresentation penalized by more than one positive rule) or the claim that it is a natural product or hand-produced, or that it contains a certain alloy or attains a certain standard of purity or has a certain place of origin (one thinks in particular of agricultural products) or that it has gained prizes or been highly recommended in shows, exhibitions, etc., when none of these are true. Moreover, where there exists some documentary proof of the event attributing the success to another competitor, as well as a false assertion, there is an implicit assault on the credit of the competitor amounting to denigration, which has been examined above as likely to cause confusion, and this case will therefore be treated with greater severity.

Still, where there is no more than a vague claim, however inflated, which can only be appraised subjectively and there is no disparagement of another product (to bring it within our hypothesis of denigration), it seems difficult, if not impossible, to indict it as an act of unfair competition. Thus, the claims that a product is of extra quality, or first class, or that it is world famous, a prize-winner, or universally recognized as the best, are within the tolerable limits of commercial advertising and cannot genuinely be considered as unfair competition.

Even the most naïve member of the public knows what importance to attach to such claims. There is no deceit, for it is so obvious to those of only normal common-sense. Instead of *dolus malus* in contract they constitute *dolus bonus,* which is not calculated to vitiate the consent of a contracting party. Hence all the above-mentioned assertions will not be sufficient to found an action for unfair competition because no consumer takes them seriously.

(d) A very diverse class of acts of unfair competition is presented by *particular forms of sale or offers of services to the public, which are not considered proper.*

The limits of this category are most difficult to define, and because of the innumerable facets of business competition many curious cases arise. Yet it is submitted that not all the instances which are placed by law in this category should truly be considered unlawful.

One of the principal forms which legal writers and often legislations have dealt with is that of the "clearance sale." It is a recognized fact and in keeping with normal economic needs that a business must often clear old stock to replace it with new, so that certain products may be sold at less than list price, and there is nothing exceptionable in the practice. But it may happen, and often does, that under the guise of a clearance sale, which is usually announced by a blast of publicity, the public is wrongly induced to think that it will obtain articles at

more favorable prices. Where the advertisement is plainly untrue and can easily be disproved objectively, as in the case of a society's winding up with a sale by the liquidator or a sale due to transfer or closure of a business, it should not be difficult to found an action for unfair competition. But in many other cases the proof is not so easy, for it is hard to deny that a clearance sale is properly so called when a tradesman seeks to clear his stock rapidly. Hence, we would not classify such sales as illegal in normal conditions, and it is noticeable that the continental codes which deal with the problem, rather than imposing a general prohibition against such sales, are concerned that the sale is in fact genuine or that it does not prolong itself unnecessarily, or repeat itself in too short a time with the same trader.

Another debatable form of sale is the "snow-ball sale," which, following a geometric progression, may attain absurd proportions. Jurisprudence is therefore right in condemning this form of competition, for it may all too easily result in a swindle of the purchaser, and many codes have established special rules against it.

Amid these forms of sales may be those which are accompanied by prizes which can be obtained by those who send in a certain number of tokens or coupons which are to be found on the product, and are so distributed among the products that the requisite selection is not easy to complete. Assuming that the prizes are substantial, the whole scheme becomes a lottery and will be considered illegal as impinging on the state monopoly. Naturally, this is true only where the prize is unduly great in relation to the price of the product, but apart from this the commotion occasioned by such devices in the commercial world has prompted the intervention of legislation in Italy, so that such a sale cannot be undertaken without the previous permission of the Finance Minister or the Controller of Finances according to the circumstances (see D.L. 25, March 1937, n. 540, converted in L. 7 June 1937 n. 1126).

(e) A form of competition which may have grave consequences and whose legality has been much discussed involves resort to *boycott.*

By boycotting or black-listing is meant a concerted plan not to deal in certain economic activities or to enter into contractual relations with a particular commercial competitor. It will be seen that a boycott is distinct from a strike, which is a noncontractual cessation of work relations, from what is known in Italy as a *"white strike"* which is suspension or voluntary slackening of work by the workmen, and from picketing, which is a watch kept outside an establishment to persuade the employees not to work there.

Boycotting which is of interest here is an agreement not to provide or accept goods and services, outside the normal scope of the penal code, so that the question of its legality remains open. There are two possible solutions: either to start with an assessment of the legality or

illegality of the agreement behind the concept of boycotting, or to assess the legality of the acts undertaken in the exercise of a boycott. It is contended that the former is the only legitimate course. Thus, if one does not doubt the right of one person not to enter into dealings with another, it would appear strange that a combination by several persons doing the same thing which is legitimate should automatically be considered wrongful. Nor can it be said that the test is the number of participants, or the gravity of the consequences, for there may be a collective withdrawal from relations, which, because it is spontaneous and not prearranged and consists of many individual abstentions, is perfectly lawful. The test rather is that which we have so often stressed —that of judging the action by the principles of correct commercial competition and what is commercially proper.

From this point of view, it is clear that in many cases a prearranged boycott of a competitor, perhaps for reasons of politics, religion, or race, or worse, propaganda and incitement to the public to boycott a competitor, may amount to unfair competition. It may, but need not always, we think, be illegal. For example, a compact freely entered into, involving the nonparticipation by one of the parties in a free industrial coalition may imply an understanding not to furnish or accept services or goods from a certain competitor, but it would not constitute illegal competition, nor would it be sanctioned as such. An exception of course occurs in cases, such as the provision of public services, where there is a positive obligation arising from the contract and a prohibition against refusal to fulfill one's resulting duties.

This is a concise, but reasonably complete, picture of the development of unfair competition in continental jurisprudence and law. Perhaps, it may be observed in conclusion that in no other field of law has there been such development in the last thirty years.

RITA E. HAUSER

The Use of Index Clauses in Private Loans

A Comparative Study

Economic instability, in the form of periods of inflation and deflation, has been one of the chronic business phenomena witnessed since antiquity—and more particularly since the era of the Industrial Revolution. Price records show that at least one sizeable price swing each decade has occurred in the more advanced economies. The post World War II period is particularly characterized by its mounting inflation, by the fact that a sum of money no longer buys the same amount of goods or services which it bought the year before. And immediately preceding the second World War, the western world was immersed in a period of deflation of prices, one so drastic that it evoked the broadest of economic legislation.

It is fundamental that such drastic changes in the value of money will markedly affect the economic relations of private parties as determined by agreements made between them. Despite the alteration in the value of a performance to be rendered in money due to the impact of inflationary trends,[1] it has been a long accepted doctrine of law that any functional changes in the value of money are ignored when determining the rights and obligations of private parties to a domestic, as opposed to an international, contract.[2] This doctrine of nominalism is roughly stated by the French axiom: *le franc égale le franc,* and holds true as a judicial fiction despite the fact that the present franc is worth only 1/200 of its original value when created in the Year VI (1803).[3] A money obligation, thus, has only the "value" it expresses, so that an agreement to pay $100 will be discharged by the payment of $100, regardless of the purchasing power of $100 when paid. This

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[1] The price fluctuation to be viewed here will be that of inflation only, inasmuch as constant price rises characterize the present day economic situation of most western nations.

[2] This paper does not deal with the problem of monetary fluctuation as it affects foreign money obligations, since such obligations have been given substantially special treatment by the courts and the legislature, resulting in a separate body of law governing foreign money obligations.

[3] The French populace is more prone to accept monetary reality than are the civil courts, for the franc is appropriately called by Frenchmen the franc Poincaré, or the franc Auriol, according to its value and popular worth at any given time following some drastic monetary reform initiated by the Minister of Finances. See Toulemon, "Évolution de la Jurisprudence en matière de clauses d'échelle mobile et des clauses de variation suivant indices," Rev. Trim. de Dr. Comm. (1951) 663.

principle of nominalism has been formally expressed by the United States Supreme Court as the "legal constancy" doctrine, which is to say that the legal ratio between the monetary unit and its gold value assumes a fictitious stabilization of unit without regard to its actual purchasing power.[4]

The basis of this legal fiction rests not on any desire of the law to protect the parties from what might turn out to be a false determination of the extent of money fluctuations by the courts, nor to prevent judges from revising any contract terms and thereby doing violence to the concept of the will of the parties as the very base of contractual agreements. Oddly enough, it rests on another basic contract law principle: the interpretion of the contract is to be governed by the intent of the parties. Because all modern history has been marked by periods of monetary fluctuations, the parties are now held to realize that money contracts have a congenital weakness, or as the Swiss Federal Tribunal has said, "Fluctuations in money constitute one of the risks of a contract." [5] The very item which, when tendered, will serve to discharge one party's obligation is, in itself, subject to a change in value beyond that party's control. Inasmuch as history has always shown that such changes can and do occur in any and all amounts, the courts have concluded that, in the absence of any provision to the contrary, the parties have accepted the risk that such changes shall operate again. Nominalism becomes thus a doctrine of intent of the parties as deduced by the courts, and not at all a principle of public policy.[6] As a result, the law deviates from the nominalistic principle only when the parties have expressly refuted the *raison d'être* of its existence, *i.e.,* when they have stipulated that they will not bear this risk of monetary change beyond any given amount.

Because nominalism is derived, as a legal principle, from what the courts deduce to be the intent of the parties, it follows that the parties may refute this deduced intent by manifesting intentions to the contrary through the use of special contract provisions intended to protect them against the effects of inflation. Several types of protective clauses have traditionally been used. First, the parties may stipulate to provide performance in kind, *i.e.,* a quantity of a given commodity, thus avoiding altogether the perilous exchange of money. Second, payment may be stipulated in a foreign currency more stable than the domestic one. Third, payment may be set in the domestic currency, but linked to some item which may be expected to have the least amount of fluctuation in value: gold or silver generally. The gold clause was, thus, a frequently employed technique until rendered illegal by legislative

[4] Nortz v. United States, 294 U.S. 317 (1935).

[5] "Les fluctuations des changes constituent donc un des aléas du contrat." 26 March 1931. B.G.E. 57, ii, 370. Translations are by author.

[6] See Parker v. Davies, 79 U.S. (12 Wall.) 457 at 548 (1871) (dictum).

abrogation in the United States,[7] and by judicial extrapolation from the legislative text in France.[8] The gold clause was never interdicted in England, but is of infrequent use.[9]

Lastly, the failure of gold clauses has led parties to link the amount to be repaid to some given index, price or otherwise, in what is generally called an index or sliding scale clause (*clause d'échelle mobile*). Although not widely utilized in the United States and Britain, it is very frequently employed in France where inflationary pressures have been more severe than in the other two nations. The index clause has achieved some prominence in the United States and Britain in collective bargaining agreements where the index chosen is generally the cost of living index, and in long term building contracts using most often the wholesale price index. In general however, very little use of the index clause has been made in loan agreements between private parties. In France, in addition to long use of this clause in collective bargaining and building contracts, it has been widely applied to bond issues of government owned or operated enterprises, and of larger private corporations, generally with special legislative permission.[10] The clause has also been frequently employed in straight loan contracts between private parties, but until June of 1957, its validity was in doubt, being hotly contested by the lower courts and by legal writers.

The purpose of this paper is to evaluate the efficacy and legality of

[7] 48 Stat. 112, 31 U.S.C. 463. This legislation was held constitutional in Norman v. Baltimore and Ohio R.R., 294 U.S. 240 (1934); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935).

[8] The French legal tender acts (*cours forcé* and *cours légal*) of 1870 were viewed as rendering illegal all gold clauses by the reasoning that private parties could not stipulate any value of money which differed from that set by law, since the determination of the value of money, it was concluded, is an issue of public order. Article 6 of the Civil Code prohibits private agreements derogating from any rule of public policy (*ordre public*).

The French Cour de Cassation, in a later line of decisions evidencing a remarkable exposition of logic devised to protect French creditors suing *foreign* debtors for payment of gold, declared that the legal tender acts were of internal force and application only, geared to assure domestic monetary stability, and therefore not operative as far as international contracts were concerned. Cour de Cassation (Req.), June 7, 1920, (1920) S.I. 193. As a result of this decision, for purely domestic contracts, no private stipulation as to payment based on the legal relationship of paper money to gold could prevail by force of the legal tender acts. If the transaction were international, such stipulations were enforceable. As to the changing concept of the term "international contract," see Cour de Cassation (Ch. civ.), May 17, 1927, (1928) D.P. I. 25; Cour de Cassation (Ch. civ.), February 14, 1934, (1934) D.P. I. 78; and particularly Cour de Cassation (Ch. civ.), January 14, 1934, (1934) D.P. I. 73.

[9] As one British writer put it, British creditors are "generally content to provide for payment in pounds sterling and to rely on the stability of the British currency." Mann, The Legal Aspects Of Money (2nd ed. 1953) 103.

[10] The most common method of granting legislative approval was by way of delegation to the government under the terms of some broad legislative act. The particular grants of approval can thus be found in ministerial *arrêtés*, and governmental decrees, which have the force of law in France. Private corporate indexed bonds were validated by the law of February 25, 1953.

the index clause in private contracts for the loan of money, with particular reference to the already significant French experience. It is of great interest to determine the attitude of American legal thinking, however roughly formed at this moment, toward the use of index clauses, and to familiarize ourselves with the economic arguments both for and against their use. The experience of the French should provide a helpful guide to American jurists.

In the United States, only one bond issue of any major significance containing an index clause can be cited in recent years. The economist, Irving Fisher, persuaded the Rand Cardex Company in 1925 to issue bonds containing a promise to pay such amount of money as would yield the then present purchasing power of $1000 plus interest at the time of payment, calculation to be based on the wholesale price index of the United States government. This issue was largely unsuccessful and was soon retired. It has been suggested that a possible reason for its lack of success was the fear that these bonds might not have been deemed negotiable instruments according to the terms of the Uniform Negotiable Instruments Law (sections 1 and 2), as they did not provide for payment of a "sum certain" in money.[11] Perhaps, too, few people placed much reliability in the taking and use of government indices which were then very much in their infant stage. In all events, few private loan agreements in the United States have contained an index clause.[12]

There seems to be no legal writing, however, which calls into question the validity of the index clause. Certain legal objections to its use, nevertheless, are to be anticipated. These objections concern the legislative abrogation of gold clauses, the possible incompatibility of the index clause with the legal tender acts, and lastly, its inconsistency with the nominalistic principle.

The Congressional Joint Resolution of 1933 abrogating the gold clause should have no applicability to the index clause. The Resolution abrogated a promise to pay in gold, or in currency, the amount of which is to be measured by the value of gold. There is no prohibition against determining the ultimate sum to be paid when such a determination is to be calculated against the value of money (paper currency) itself, *i.e.,* in terms of money's purchasing power at maturity date.

Nor should the index clause be considered incompatible with the legal tender acts in force.[13] The issue has been squarely raised in both

[11] Nussbaum, Money in the Law: National and International (1950) 308.

[12] Several corporations recently have resorted to using indexed bonds in employee share the profits schemes. Christiansen Corporation offered its employees a cost of living debenture, with a ceiling of 150 and a floor at 100, the issuing price. Management Record, June, 1953, at 200.

[13] By the term "legal tender acts," we refer to the whole body of legislation in

Australia and France, and the highest courts of both countries have ruled that the index clause is compatible with the legal tender acts. The index clause is but a yardstick, a method of determining the amount of the debt. The clause in no way concerns the mode of payment, nor does it prevent payment in whatever is legal tender at the moment. The Australian High Court noted: [14]

> "No question arises concerning the medium of discharging a debt, the form of currency to be used or tendered. Whatever the liability of the purchaser may be ascertained to be, that liability is to be discharged in by as many units of currency as amount to the sum so ascertained."

In France, prior to the conclusive decision of the *Cour de Cassation* of June 27th, 1957,[15] validating the index clause in private loan contracts, the question of its compatibility with the legal tender acts was widely disputed. The French supreme court had invalidated the gold clause in domestic contracts on the basis of its incompatibility with the legal tender acts. As stated by Colin and Capitant, the law refused to recognize any clause that showed "the suspicion of the parties respecting the value of the national currency." [16] But they go on to note that the court decisions, nevertheless, recognized the validity of a commodity clause, or an obligation the amount of which is represented by the value of a certain quantity of a product on payment date,[17] this on the ground that these clauses did not have as their aim avoidance of the legal tender acts, but rather were employed essentially to protect the parties against the effects of economic circumstances. The authors then conclude that the law must admit the validity of clauses based on general or specific price indices, for these indices indicate clearly that the parties did not intend to speculate against the value of money *per se*.[18]

This subtle reasoning as to the intent of the parties when stipulating an index was picked up by the lower courts, and is the fundamental rationale for distinguishing those decisions that affirmed the index clause in question, and those that rejected it.[19] The courts divined

force today establishing and governing the value of money in circulation, and its obligatory acceptance as a mode of payment.

[14] Stanwell Park Hotel Co. Ltd. v. Leslie, (1952) 85 C.L.R. 189.

[15] Sem. Juridique, July 10, 1957 at 10093 *bis*.

[16] 2 Colin et Capitant, Cours Élémentaire de Droit Civil Français (1953) s. 487.

[17] See particularly Cour de Cassation (Req.), February 18, 1929 (1929) D.P. I. 113.

[18] Colin et Capitant, *op. cit. supra* note 16.

[19] The following courts pronounced in favor of the nullity of the index clause: Rouen, February 2, 1950, (1950) J.C.P. II. 5435; Trib. Seine, February 27, 1951, (1951) Gaz. Pal. I. 316; Lyon, June 25, 1951, (1951) D. 275; Trib. Civ. Seine, October 23, 1952, (1952) Gaz. Pal. I. 68.

The following courts pronounced in favor of the validity of the index clause: Trib. Civ. Caen, April 20, 1950, (1950) J.C.P. II. 5547; Paris, July 3, 1951, (1951) D. 535;

whether the creditor was merely seeking to protect himself against inflation, or whether he sought to protect himself against changes in the value of money. As was noted by René Capitant, this distinction between economic and monetary fluctuation was a ridiculous one, for most economists are agreed that the value of money is represented in the general level of prices, so that both notions are, roughly speaking, identical, and the judicial treatment of the two should therefore be identical.[20] The recent decision of the *Cour de Cassation* settled the problem by refusing to recognize this distinction of intent, and validating the given index (based on the price of wheat). It seems clear that the *Cour de Cassation* validates, as well, most commonly used indices of basic commodities, or those indices established by the National Statistical and Economic Studies Institute.[21]

As a result of this decision, there seems to be no question in France that the index clause does not derogate from the legal tender acts in force. This is clearly a proper analysis of both the *cours forcé* and *cours légal* acts, the French legal tender acts. The latter act only requires that the creditor accept payment in francs to the amount of the debt. It has no bearing on what the quantity of the obligation is, or how it was ascertained, but bears only on what is to be considered a valid money of payment. As to the former, it merely signifies that bank notes issued by the Bank of France are inconvertible, the government having no obligation to redeem them in gold.

Even more difficult a question for the French was whether or not the index clause ran afoul of the nominalistic principle, which in

Amiens, November 13, 1951, (1952) D. 170; Paris, November 27, 1952, (1953) D. 133. A reading of these typical cases will immediately show that the determinative issue was the question of intent, and this was deduced by the court from such facts as the nature of the index chosen, its relation to the business of the creditor, whether or not it was reciprocal. It appeared to the reader that such factors often weighed both in favor and against the index clause, so that generally speaking, the result rested on the judge's disposition as to the validity of the clause. See also Esmein, "Le prêt d'argent avec clause d'échelle mobile," Gaz. Pal. 1951. 2. Doct. 2; and Gaz Pal. 1952. 2. Doct. 4 col. 2. V.

[20] R. Capitant, "Contrats Administratifs: Rapport Français," 8 Travaux de l'Association Henri Capitant (1953) 209–11.

[21] In his comment on the case, Professor Levy of the Paris Faculty of Law indicates that there is little chance of the decision being reversed at a later date by the same court. There had been a bit of a shock when the decision was rendered, because the opinion of the *Procureur Général* was in favor of the nullity of the index clause, and it is quite rare in civil matters for the *Cour de Cassation* to reject his opinion. Levy then takes the precaution of suggesting to his legal audience that, in order to be certain of acceptance of any index clause, it would be wise to make no mention of monetary intention, i.e., any allusion to a possible devaluation, although he too notes that the distinction as to intention of the parties noted *supra* note 18 is truly a meaningless one, but one unfortunately part of prior judicial history in the lower courts. In addition, the clause should be made reciprocal so that the debtor would benefit if prices fell. It is also wise to choose an index concerning some commodity in the sphere of activity of the creditor to prevent a defense of an unfair bargaining position or the achievement of some unfair gain to the creditor. Levy, Sem. Juridique (July 10, 1957) 10093 *bis*.

France is codified in Article 1895 of the Civil Code.[22] If Article 1895 were considered an expression of public policy (*ordre public*), then Article 6 would prohibit private parties from derogating from its terms. The *Cour de Cassation* had once before inferentially ruled on the point.[23] In its decision of June of last year, it squarely held that Article 1895 was not of *ordre public,* refusing to accept the idea that Article 1895 was intended to prevent a debtor from freely taking on himself the risk of inflation in a loan agreement, since it was clear that he was free to do so in other forms of contracts.[24]

It is fair to conclude, then, that American courts would have even less difficulty than the French as to the effect of the nominalistic principle, which is in no way codified in the United States, nor stipulated as a matter of public policy. Indeed, as we have shown, the rationale of the nominalistic principle is that the parties so intended it, and surely the intent of private parties is not a matter to be deemed an affirmative issue of public policy.

Since there seems to be no direct legal impediment to the judicial acceptance of the index clause in the United States, the reluctance to its use thus far is probably due to either or both of the two reasons indicated above:[25] the question of negotiability under the Uniform Negotiable Instruments Law, and the problem of choosing and relying on a given index as an accurate measure of changes in value.

The state of the law is uncertain as to the effect of an index clause on what otherwise would be a negotiable instrument under the Uniform Negotiable Instruments Law. In a corporate bond containing such an index clause, for example, the sums payable would not be ascertained until just prior to payment, and not at the time of the agreement. There are no cases on the issue of whether or not this meets with the requirement of a "sum certain," leaving the question open to broad discussion.

Referring to certain analogous situations that have been ruled on, one might well argue that such bonds would have commercial, if not mathematical, certainty. In *Farmers Loan and Trust Co. v. Plank,*

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[22] We repeat the terms of Article 1895: "The obligation, which results from a loan of money, is only the numerical sum set out in the contract. . . . The debtor is bound to render the numerical sum borrowed, and only that sum in whatever is legal tender at the moment of payment."

[23] Cour de cassation (Ch. Comm.), March 12, 1952, (1952) J.C.P. II, 6998.

[24] It is to be noted that Article 1896 fortifies this view, for it states that Article 1895 has no effect where the loan was made in gold bullion (*lingots*). *A fortiori,* Article 1895 should not apply to merchandise or price indices which are even further removed from money, *qua* money, than is gold bullion.

As a result of the decision of the *Cour de Cassation,* Article 1895 now stands merely as a rule of law governing the question of the intent of the parties (*loi supplétive*) in the absence of express statements of intent in the contract. It is not a rule of public policy (*loi impérative*).

[25] See p. 353 *supra.*

notes had been issued providing for a discount only if payment was made within a certain number of days before maturity.[26] It appears that such discounted notes would not present a "sum certain" at any given time up to the final day on which the discount could be granted. The notes were upheld as negotiable. So too, bonds payable in a foreign money at the rate of exchange prevailing on maturity date, such money fluctuating heavily between the date of the contract and the date of payment, were deemed negotiable under the Uniform Negotiable Instruments Law.[27] And in bonds containing the most frequent protective device until 1933, the gold clause, it can certainly be said that such bonds were universally deemed negotiable under the Uniform Negotiable Instruments Law, despite the fact that the amount to be repaid to the creditor was uncertain until payment date, depending as it did on the relationship of the dollar to gold, which was subject to alteration at any given moment.

The English courts, working under a similar act, the Bills of Exchange Act, have been very liberal in recognizing commercial custom and usage as a basis of negotiability under their act. Smith indicates as early as 1915 that, "It may therefore be laid down as a safe rule, that, where an instrument is by the custom of the trade transferred by delivery, and is also capable of being sued on by any person holding it *pro tempore,* it is entitled to the name of a Negotiable Instrument." [28] Mann considers that commercial obligations carrying index clauses will achieve prominence in England, and "come to be widely used in conveyancing practice." [29] He makes no mention of any possible objection to their use on the grounds of non-negotiability. Were the index clause to achieve greater use in loan contracts in the United States, based on increased need to protect the creditor against the effects of inflation, then it could well be argued that such contracts would receive a certainty as to the sum due in terms of commercial trade and understanding. The term "sum certain" can be interpreted to include sums uncertain at the time of the contract, but ascertainable by specific criteria set out in the contract as of maturity date.

Assuming that American courts reject this argument of commercial certainty and usage, the parties may be able, by express contract provision, to render the bonds negotiable. Two New York cases are generally cited for the proposition that negotiability by contract is not feasible.[30] A reading of the two decisions leads the reader to conclude

[26] 98 Neb. 225, 125 NW 390 (1915).

[27] Incitti v. Ferrante, 12 N.J. misc. 840, 175 A. 908 (1933). This is a clear derogation from Section 2(4) requiring a fixed rate, or the rate prevailing on the day the contract was formed.

[28] Smith, Leading Cases (12th. ed. 1915) 535.

[29] Mann, *op. cit. supra* note 9 at 535.

[30] Manhattan v. Morgan, 242 N.Y. 38, 150 NE 594 (1926); Enoch v. Brandon, 249 N.Y. 263, 164 NE 45 (1928).

that, although the courts failed to expressly say so, they gave effect to the contract provision to render the contract negotiable, and decided the cases on other grounds. Where the point has been squarely raised, many courts have not hesitated to hold such clauses effectual.[31] These clauses usually provide for some feature of negotiability, such as giving good title to a bona fide purchaser as against other claimants, in what are otherwise non-negotiable instruments.[32] One lower Pennsylvania court went so far as to hold that an otherwise non-negotiable instrument may be rendered negotiable by including the words, "This note shall be negotiable." [33] It would seem that many courts are fairly disposed to rule in favor of negotiability where the parties have so indicated this as their intent, and the terms of the agreement do not flagrantly derogate from the requirements of the Uniform Negotiable Instruments Law.

A last resort to ensure negotiability of an indexed obligation might well be the legislative route. New York State, in 1930, provided that certain types of corporate bonds held non-negotiable under the negotiable instruments act could be made negotiable by agreement.[34] Whether similar action will be taken in any other state, or by all states via a modification of the Uniform Negotiable Instruments Law, it seems would turn on the frequency of use of index clauses, and the attitude of the legislature as to their impact on the total economy in an inflationary period.[35]

It is submitted by this writer that the question of negotiability will not prove to be a great barrier to the more frequent use of the index clause in private loan agreements.[36] The use of similar protective devices in the past, particularly the gold clause, and the very frequent occurrence of discounted and premium bonds having a limited time period in which the discount or premium can operate, have never been challenged seriously as not meeting the conditions of negotiability prescribed by the Uniform Law.

The question of negotiability of indexed bonds has never been raised in France. Commercial paper, such as bills of exchange and promissory notes, are governed by the terms of the Uniform Law on Bills of Exchange and Notes signed in Geneva in 1930 by France and other continental countries.[37] This law requires a "sum certain" as an essen-

[31] See particularly Morgan Bros. v. Dayton Coal and Iron Co., 134 Tenn. 228, 183 SW 1019 (1915); Anglo-California Trust Co. v. Hall, 61 Utah 223, 211 Pac. 991 (1922).

[32] For a detailed discussion of the problem, see Beutel, "Negotiability by Contract," 28 Ill. L. Rev. (1933) 205.

[33] Gray v. Gardner, 12 Pa. D.C. Rep. 449 (1929).

[34] N. Y. Personal Property Law, art. 8, sec. 262.

[35] See page 360 ff. *infra* for the economics of the problem.

[36] Supporting this view, Dawson and Cooper, "Contracting by Reference to Private Indices," 33 Mich. L. Rev. (1955) 655. For a view *contra,* see Nussbaum, "Multiple Currency and Index Clauses," 84 U. Pa. L. Rev. (1935–36) 569.

[37] League of Nations Off. J., 11th year 993 (1930).

tial to negotiability for all types of commercial paper; it is so stipulated in Articles 110–112 of the French Commercial Code.[38] Bonds, however, are not within the scope of the Uniform Law, for they are treated in France and elsewhere as *valeurs mobilières* (securities) and are governed by separate rules, since the greatest number of them are sold publicly on the exchange (*titres de bourse*) rather than by private transfer.[39] There is no text requiring that such securities be expressed in a "sum certain." As a result, no question has been raised as to the negotiability of indexed bonds.[40] As to other forms of commercial paper, a leading commercialist, Professor Roger Houin, has indicated to this writer that the issue of negotiability has never come before the courts simply because most paper is of short term duration, generally three to six months, and few creditors have been so fearful of a runaway inflation as to stipulate a protective index clause.[41]

An additional practical problem in the utilization of the index clause in all the legal systems under consideration is that of the choice and operation of the index itself. There are many more examples of indices in use today since the early Rand Cardex attempt in the United States, and as for France, indexed bonds have become the rule rather than the exception. Collective bargaining agreements in America utilize the cost of living index published monthly by the Department of Labor, and this would seem a proper choice for determining the level of wages. In private loan contracts, it might be more feasible to choose an index of any one or several commodities that have particular pertinency to the parties. This has been the French pattern, so that in a loan between grocers, the parties often used the price of butter and milk as an index. Corporations could choose the wholesale price index of their own or allied products, or the price governing such basic commodities as steel. The issue of a proper index would be easily determined by the parties, it is submitted, based on the commercial interests they may have. As long as the index chosen is not arbitrary and completely unrelated to the creditor's financial and business situation, there should be no problem in its acceptance by

[38] See Ripert, Traité Élémentaire de Droit Commercial (3rd ed. 1954) S. 1755.

[39] *Id.* sec. 1536–48.

[40] *Id.* sec. 1294*bis* Ripert here discusses the validity of indexed bonds, and nowhere raises the question of negotiability.

[41] Professor Houin is of the opinion that an indexed bill of exchange, for example, would be deemed non-negotiable in France because it fails to meet the requirement of a "sum certain." It appears, in his opinion, that many private loans carrying an index clause have not been expressed in commercial paper, but rather have been simple contracts transferable by assignment.

There is another interesting solution in which the French law is moving away from a rigid requirement of a "sum certain." The law governing the registration of mortgages required that the amount be a determined sum. Several *notaires* had registered indexed mortgages, bringing to the fore the question of fulfillment of the "sum certain" requisite. Conflicting decisions were finally resolved by the law of January 4, 1955 (Article 2148(4)) authorizing such indexed mortgages.

the courts as but another contract stipulation agreed to by the contracting parties.

Secondly, the methods of taking indices, of interpreting their results, and of statistically ascertaining the rise or fall in price, have greatly matured. Government indices have become the basis for all forms of planning and decisions by both the government and private entrepreneurs. They have improved sufficiently to become a reliable source of measuring the impact of inflation in most sectors of the economy.[42]

This writer is of the belief that a wider use of such clauses will come about in the near future as inflation continues to be a dominant feature of the economic scene. There will, undoubtedly, be criticism leveled against its use by economists, as occurred at the time of the signing of the General Motors collective bargaining agreement of 1955, who cite the inflationary effect such clauses are deemed to produce. They will militate for judicial invalidity, or express legislative prohibition. No study of the index clause as a means of providing more perfect justice to the parties to a loan in times of economic fluctuations would be complete without some discussion of the economics involved. It is evident that a continuing inflation destroys the confidence of the creditor class in the efficacy of lending, just as it results in a general rise in the propensity to consume on the part of the public at large. Postwar inflation has also given rise to an enormous amount of autofinancing by corporations, who find it far cheaper to reinvest than to borrow. This results in a smaller distribution to stockholders. The small *rentier* class finds its economic position dwindling. The most desirable loan becomes the very short term one, where the risk of loss from depreciation is smallest. As a consequence, the cost to the debtor for such loans rises, and most debtors seek to avoid such short term borrowing if at all possible. Normal outlets for investment are thus often cut off. Where the creditor continues to invest in long term loans, his return is greatly diminished by the time repayment is made. As a result, investment money may be channelled in the least socially desirable outlets, but those that offer the speediest return. The net result may well be a malorientation of investment funds, and consequently of economic growth.

Since almost all groups in the society are affected by inflation, it follows that those with sufficient power agitate for some relief. The results of power pressure are seen in parity legislation for farmers,

[42] The question of proof of the amount of the debt due should pose no great difficulty. Expert testimony could easily be furnished in the event of litigation. Indeed, in many situations, the result of the operation of the index clause would be self-evident, and could be simply noticed judicially. Assuming the parties have chosen an index of sufficient specificity so as to provide definite modes of calculation, the deduction of the extent of change based on this index could, generally, be easily ascertained.

index clauses as a *sine qua non* of collective bargaining for large industrial unions, and in France, a good bit of *ad hoc* legislative relief for the landlord class.[43] The noninstitutional creditor, generally lacking membership in some powerful organization which can pressure in his interest, is forced to seek the quickest return on his money, or to demand some protective stipulation from the debtor as a term of their contract. In France, creditors early followed this classic pattern. They turned away from government investments which tend to be of a long term nature, and put their money into short term outlets that bore a higher rate of interest. To counter this, the French government, by legislation, validated the issuance of indexed bonds by government enterprises.[44] Indexation has since become an essential to the success of a bond issue.

With the marked increase in the use of indexation in France, and with the signing of the General Motors-Ford collective bargaining agreements introducing indexed wage scales, there arose a cry of alarm on the part of economists and certain public administrators in both nations. Fear was expressed that such clauses would produce an enormous inflationary pressure, and thereby defeat the monetary and fiscal policies being undertaken by the government to counter inflationary trends. The traditional *schema* offered as proof of their contentions ran something like this: Assume X corporation, using the price of their product as the basic index, issues indexed bonds. As inflation continues, the cost of its raw materials, labor, etc. rises, and so the price of X's product eventually goes up. X corporation must then pay a higher rate of interest to its creditors. Assuming X corporation, working under a full employment situation in the nation, is not willing to decrease its investment level but wishes to ensure itself a continually rising production to meet the ever increasing demand, it finds it cannot maintain its level of profits with the now higher costs of financing its debt. X corporation then concludes that it must pass the higher financing cost off to the public, and its prices go up. And there we are caught in the inflationary spiral that seemingly has no end.

In analyzing the inflationary situation, it is essential to try to determine what factors make for a continuing upward price pressure causing X corporation's costs of production to rise. Classical economists explained it by the simple axiom that demand was outrunning supply. The term "demand" means, of course, effective demand, *i.e.,* the amount actually sought in the market with available funds, and not simply desired purchases not matched by real buying power. The

[43] See the following: law of June 30, 1925; decree law of July 1, 1939, art. 1; and the laws of May 4, 1948; March 25, 1949; August 2, 1949; May 24, 1951; July 22, 1952; and April 9, 1953.

[44] See note 10 *supra.*

origin of this buying power must, therefore, be determined. It has often been pointed out that the world's major inflations have not arisen on the cost side (for example, an increased difficulty in extracting major raw materials, or tapping power sources) but have resulted either from a bank financed boom in private investment, or from governmental deficit spending. This leads to a situation posterior to the boom in which liquid assets have been amassed, and it is from this supply of assets that increasing demand will arise. The extent and quality of the actual demand turns on various qualitative factors, particularly that which economists term the propensity to consume. In a boom period, there is a general trend toward higher consumption simply because most people anticipate further price rises, and purchase now to speculate against that expected trend. This is reinforced today in America by heavy expense account spending as an alternative to paying taxes.

If, as has been assumed for the X corporation, productivity is at its maximum per present capital facilities, and there is full employment,[45] then this increased spending will translate itself in increased prices. The burden of paying an additional sum to the bondholders via the operation of the price index would then add another push in the upward direction of prices. Therefore, conclude some economists, eliminate the index clause, and prevent the augmentation of the inflationary spiral.

There are several purely economic responses to this argument that can be made. Firstly, it is questionable that even a *general* adoption of the index clause would, in practice, contribute greatly toward spiraling the inflation. In an excellent paper delivered to the American Economic Association, Dr. Poole notes that there may well be a cushioning effect by virtue of the very increase in the use of such clauses.[46] The index chosen by any given group or parties to a contract will vary according to their particular economic needs, and it is probable that, in their totality, the indices chosen will tend to neutralize each other. Some will tend to encourage consumption, others not. Indeed, even for those that tend to increase consumption patterns, the end effect may well be an eventual increase in the cost of borrowing money, so that investment will be ultimately discouraged.[47] Second, the expected rise in consumption will depend on which groups are receiving the additional sums via the operation of the index clause. There has been, in the past ten years, a marked increase in the amount of personal saving in the United States. This is indicative of the fact that various social groups have fulfilled most of their major economic

[45] This has been the general situation in the western world since the war, save for the few temporary lag periods, or recessions, witnessed since the end of World War II.

[46] Poole, "Full Employment, Wage Flexibility and Inflation," Amer. Econ. Rev. (May, 1955) 583.

[47] This would be particularly true in light of the Federal Reserve Board's restrictive monetary policies employed in inflationary periods.

wants, and tend to have a low propensity to consume any additional sums received. And third, governmental monetary and fiscal policies, coupled with restrictions on consumer credit, may well keep down consumer spending. Poole concludes, after assuming the optimum conditions for the production of higher consumption: "We cannot say for sure that an escalated cost rise, even when supported by a co-operative money policy and magnified by interactions with at least some other types of escalation, will necessarily give rise to a spiral of inflation." [48]

It would seem fair, then, to conclude that the inflationary effects of a general use of the index clause are quite unknown; the few studies attempted in France have never reached any definitive statement on the inflationary aspects of indexation. Even if we assume that indexation does cause some long term upward price movement, it is important to realize that it is also an antirecession measure, and that any such measure, such as an easy money policy, results in some upward trend.[49] This may be the price we pay to prevent a downward cycle.[50]

What is more important to the lawyer, and to many economists, is the issue of an equitable distribution of the increased wealth resulting from the boom, and an equally equitable division of the costs that inflation may bring. Congress has assured one particular economic group its share in the increased wealth through direct legislation: parity for farmers. Union strength has assured most industrial workers the same through the demand for an indexed wage scale. The entrepreneurial class supposedly shares directly via higher prices and greater profits. Those groups that remain, the white collar worker, the small noninstitutional lender, and the pensioned, fixed income group, find themselves sharing little of this boom prosperity; [51] indeed, they are often adversely affected, not able to maintain the status quo as prices continue to rise. This gain of one group at the expense of another caused René Capitant, the French jurist, to call this situation a classic example of "unjust enrichment." We submit that these groups should not be denied any legitimate and legal avenue of pro-

[48] Poole, *loc. cit.* at 591.

[49] The present American recession is a typical example of the conflicts resulting from a continuing inflationary pattern, whose causes are greatly disputed, and the appearance of depression pockets in the economy. Measures proposed to counter the latter run head on with the desire to control inflation.

[50] Professor Slichter defended the Ford-General Motors escalated contract on just these grounds. Slichter, Monthly Labor Rev. (October, 1955) 1116.

[51] It is interesting to note that the Swedish government has recently permitted the indexation of governmental pensions, and both Sweden and Great Britain have been considering doing the same for all forms of old age pensions. This is intended to afford some relief to the fixed income pensioners. In France, the practice of indexing life uses to the surviving spouse has begun, since the value of the use is determined, without possibility of judicial revision, at the time of death of the donor-spouse.

tection under the guise of an anti-inflationary policy, while the stronger, more powerfully organized groups continue to enjoy the advantages of their privileged protections. This would be an inequitable economic situation, and certainly an unjust result.

Assuming that a general use of the index clause does give rise to some long term upward price pressure, the alternatives become clear. Congress could simply and expressly make illegal all indexed calculations as an unlawful speculation, or it can expressly invalidate some particular forms of index clauses, or lastly, it can continue its absence of interference, continue its silence. It is highly unlikely that the first choice could be made for political reasons, if not for economic motivations, nor that Congress would discriminate expressly by opting for the second choice. It would seem most probable that Congress will continue its inaction, and in the absence of express legislative prohibition, there is no reason for the judiciary to declare index clauses invalid. There is nothing inherently illegal in the device, as we have attempted to show. Any question as to its use turns on the issue of its advisability in a period of inflation, and this is a political question for Congress. Assuming continued Congressional silence, our problem poses itself thus: how is the inflationary burden to be distributed among the nation's populace in the most equitable manner?

If it were possible to limit the causes of inflation to one or several factors, then fairness would have us place the burden and costs of inflation on those factors exclusively. But, as we have noted, it is generally agreed that the essential and basic causes of inflation in the past have been bank financed booms in private investment, or government deficit spending. Since bank financing today is directly controlled through the Federal Reserve Board's policies, such as manipulation of the rediscount rate, and open market operations, it seems fair to deduce that present day inflationary pressures originate essentially in governmental deficit spending. Almost all writers in France are agreed today on that point as the generative factor of the greatly increasing inflationary trend in that nation. As long as the present international political situation continues, in addition to the maintenance of costly social functions which the government has assumed, there seems little likelihood that deficit spending will diminish. It is assumed, then, that such deficit spending has a socially valid purpose, geared to benefit the entire nation, and it is only equitable that the entire nation in turn bear the costs that deficit spending produces by way of inflation. It is unfair to permit certain groups to pass off their respective burden onto other less economically and politically organized ones.

We have concluded that it is politically unfeasible to prevent the use of protective measures by farmers, and large labor unions. To prohibit similar protections for other social groups means pushing the

burden of inflation on to them. If and when inflationary trends become so marked that the government is forced to take a direct hand in bringing about its reduction, then all of the population must bear the burden or tolls that such governmental action will cause. This means that attempts to curb inflation must derive from policies geared to touch all economic groups, such as higher levels of taxation, higher borrowing charges, restriction on consumer credit, tightening of the tax laws as to what constitutes a "reasonable and necessary" business expense, and if need be, direct price controls. The answer to inflation is surely not to permit some groups to benefit by special protections, leaving others to bear the cost. For reasons of equality in the distribution of increased boom wealth, and in the ultimate distribution of the charges engendered by attempts to curb the inflation, there must be a nondiscriminatory handling of the problem.

JIRO MATSUDA

The Japanese Legal Training and Research Institute

I. Legal Training in Japan and the United States

(1) Before beginning to explain the structure and function of the Legal Training and Research Institute,[1] it might be desirable to note some of the basic differences between systems of training for the legal profession in Japan and the United States.

First of all, it should be noted that there is no educational institution in Japan which corresponds precisely to the American law school. The typical Japanese university is made up of a number of departments, one of which is a department of law in which students receive legal training. However, the law department is not a graduate school in the American sense. It can be said that, in contrast to the American law school, the Japanese department of law is organized for the purpose of training those who wish to become civil servants or who wish to enter business after having received some grounding in general principles of law. The primary function of a law department is not to give professional training for practice. It is true that some graduates of university law departments enter the legal profession, but the number differs greatly from university to university, and is never large in any particular case.[2]

The second major difference between training for the legal profession in the two countries is that in Japan a single institution, the Legal Training and Research Institute, hereinafter referred to as the "Institute," is charged with the task of giving training to those who wish to enter the law in a professional sense.[3] The Institute appears to be *sui*

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[1] In the past we have used the expression "The Judicial Research and Training Institute" as an official translation of the name of the Institute. But henceforth we will use "The Legal Training and Research Institute" as the official translation because it more adequately reflects its nature.

[2] For example, in 1957 of 681 graduates from the faculty of law of Tokyo University 51 were admitted to the Legal Training and Research Institute.

The following table shows the numbers of the graduates of various universities who have entered the Legal Training and Research Institute in the past three years.

	Chuo Univ.	Tokyo Univ.	Kyoto Univ.	Meiji Univ.	Tohoku Univ.	Others	Total
1955	77	36	25	11	13	94	256
1956	66	39	34	14	13	90	256
1957	82	51	28	17	9	97	284

[3] This institute was established pursuant to Court Organization Law (Law No. 59 of 1947, as amended.), art. 14.

generis. While in some respects the Institute is similar to the American law school, it differs from its American counterpart in one significant respect; the American law school has as its primary aim the training of individuals who intend to become practicing lawyers, while the Institute aims at training candidates for the three branches of the legal profession [4] which are open to young law graduates, namely the judiciary, the procuracy, and the bar.

There are significant differences between the examination and admission systems in the two countries. Whereas in the United States one who wishes to become a lawyer must, as a general rule, pass a state bar examination after graduating from a law school, in Japan one who wishes to enter the legal profession must pass the National Law Examination which is a prerequisite to admission to the Institute.[5] After a two-year course of instruction at the Institute the students, called "legal apprentices," have to pass another examination, after which, as a general rule, they are qualified to enter any one of the three branches of the profession.[6]

(2) In the prewar period, the law departments of most Japanese universities had a three-year law course. Those who wished to enter the profession had to pass the National Law Examination, and those who wished to become judges or public procurators after passing this examination with relatively good records were appointed judicial probationers by the Ministry of Justice. They then took a one and one-half year training course. Those who passed another examination at

[4] In Japan the legal profession has been, and still is, divided into three separate groups, the judiciary, the procuracy, and the bar. Interchange among these branches is rather exceptional, although there has been some increase since World War II under the stimulus of a movement for the "unification of the profession."

For an English language discussion of the history and present situation of the legal profession in Japan, with particular emphasis on the bar, see Rabinowitz, The Historical Development of the Japanese Bar, 70 Harv. L. Rev. (1956) 27. See also Note 6 *infra*.

[5] This is provided for by law. See Court Organization Law, art. 66. Incidentally, Japan does not have a law school admission test similar to the one found in the United States.

[6] It may be proper here to touch briefly on the system of judicial appointment. The Justices of the Supreme Court are appointed by the Cabinet with the exception of the Chief Justice who is nominated by the Cabinet and formally appointed by the Emperor. Judges of the lower courts are appointed by the Cabinet from a list of persons nominated by the Supreme Court. Lower court judges are divided into two groups, full-fledged judges and assistant judges. Full-fledged judges are selected and appointed from among assistant judges, public procurators, and lawyers who have a total of at least ten years experience in the three branches of the legal profession. An assistant judge is authorized by law to exercise only limited judicial power. See Court Organization Law, arts. 39–45. For an English language discussion of the Japanese judicial system, see Gokijo, "The Judicial System of New Japan," 308 Annals of the American Academy of Political and Social Science (1956) 28.

In actuality, however, relatively few procurators and lawyers have been appointed to the bench since the war. This has been due to a number of practical considerations among which the financial factor seems most important. A successful lawyer who becomes a member of the judiciary faces a marked reduction in income.

the end of the training period were then appointed judges or public procurators. This system was modelled on the German referendar system.[7] Until 1936 there was no special training program for members of the bar. In that year a lawyer probationary system was instituted, but this system proved unsuccessful.[8] What is important to note here is that under the prewar system judges and public procurators had different training from that given practicing lawyers.

(3) During the Occupation, the educational system was thoroughly revamped along lines suggested by Occupation authorities. However, the American system of legal education was not introduced. Legal education at the university level was, on the whole, left untouched, except that only the final two to two and one-half years of the revised four-year university program are devoted to legal education while the initial one to one and a half years are given over to liberal arts training. Under the old system the entire three-year university program of those individuals taking law was spent in the faculty of law. The result has been that the amount of time devoted to legal education in the faculty of law has been shortened in the postwar period.[9]

As has already been noted, during the Occupation period the Institute was established, without Occupation stimulus, as a new center for legal training. It is located in Tokyo and is an agency of the Supreme Court. Its chief object is to train those going into the profession. At the same time it has sought to unify the training systems which were separated prior to the War.[10]

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[7] The prewar apprentice system mentioned here was established by the Court Organization Law (Law No. 6 of 1890, as amended). The original draft of this act was made by Dr. Otto Rudorff, a German legal scholar then employed by the Japanese government as a legal adviser of the Ministry of Justice. In drafting the act, he took the German Court Organization Act (Gerichtsverfassungsgesetz) of 1877 as a model. This law contained provisions concerning the referendar system.

[8] The main reason for the failure of the lawyer probationary system appears to have been financial. The Government provided no financial support for lawyer-probationer stipends. Consequently, the lawyer-probationers had difficulty in devoting themselves exclusively to legal training because they had to work to support themselves.

[9] As of 1957, there were 499 colleges of which 230 are universities with four-year programs and 269 are junior colleges usually with a two-year program. Among the 230 universities there are 62 which have *Daigakuin* (graduate school). The function of the *"Daigakuin"* is to give students advanced academic training rather than training in professional skills.

Twenty-five of the 230 universities have faculties of law. 9 have a law section in a "faculty of law and economics," or "faculty of law and literature," etc. 11 of the 269 junior colleges teach law. For English discussion about the educational system of Japan, see Hall, Education for New Japan (1949).

[10] See art. 14, Court Organization Law.

The idea of unifying the training system first appeared in the third draft (Aug. 7, 1946) of the revised Court Law which was drafted by the 5 members of the drafting committee on the Court Law appointed on July 20, 1946, by the Advisory Council of Reform of the Judicial System attached to the Ministry of Justice. This draft contained a provision that the prewar system of separate apprentice training should be abolished, and that a unified system of "legal apprentice" training administered by the Supreme

(4) As mentioned above, one must pass the National Law Examination in order to enter the Institute. This Examination is administered by a committee attached to the Ministry of Justice.[11] It consists of a written examination in which the Constitution, Civil Law, Criminal Law, Commercial Law, Criminal Procedure, and Civil Procedure are required subjects. The Law of Administrative Litigation, Bankruptcy Law, Labor Law, International Private Law, and Criminology are electives, from which the applicants select. An oral examination on the required subjects follows for those who have passed the written part.

Nearly all applicants for the Examination are university students or graduates.[12] Each year the number of applicants is 6,000 or more of whom 250 to 300 are successful.[13]

II. Organization and Training of the Institute

(1) The Institute has a staff of thirty, excluding the President, of whom 12 are judges, 6 public procurators, and 12 practicing lawyers. All of them are selected by the Supreme Court. The President is selected by the Supreme Court. He administers the affairs of the Institute and supervises personnel under the supervision of the Chief Justice of the Supreme Court. The present President is the second since the

Court should be adopted. This provision was adopted by the Advisory Council as one of its recommendations, and the Government, on the basis of the Advisory Council recommendation, submitted to the Diet a bill on the new Court Law containing the above-mentioned article. The bill passed the Diet in April 1947 without any modification of this article. As was standard procedure for all major legislation at that time, the bill had been reviewed and approved by the Occupation Authority before being submitted to the Diet, but there is no evidence that the Occupation authorities made any suggestion concerning this particular article. See Naito, "History of the Postwar Reform of the Japanese Judicial System," Judicial Research Program Series, Legal Training and Research Institute (1957) (in Japanese).

[11] This committee consists of 3 members—the Vice Minister of the Ministry of Justice, the Secretary General of the Supreme Court, and a lawyer who is appointed by the Ministry of Justice on the recommendation of the Japanese Federation of the Lawyer's Associations. See National Law Examination Law (Law No. 140 of 1949, as amended), art. 13.

[12] According to article 3 of the National Law Examination Law, nongraduates of the universities are qualified to take the National Law Examination if they pass a preliminary examination provided for by the Law. Every year approximately 600 to 1,000 people take the preliminary examination and some 20–50 pass it. Of these, six to ten pass the National Law Examination. (The figures are for the period 1952–1956). See also Note 13.

[13] The following table shows the number of applicants and the number of successful applicants since 1952.

	Applicants	Successful Applicants
1952	4,765	249
1953	5,138	293
1954	5,172	243
1955	6,305	250
1956	6,714	301
1957	6,920	286

establishment of the Institute, and he, like his predecessor, is a judge, though there is no requirement of law that he be a member of the judiciary.

Instructors drawn from the judiciary and the procuracy are full-time teachers, and, though they retain their positions as judges or public procurators, they devote full time to the work of the Institute. Lawyer-instructors are selected from among practicing lawyers of high repute and long experience. They work at the Institute on a part-time basis. All instructors confine their teaching to their respective fields of specialization. The instructors are individuals with sound practical experience; they are able to emphasize practical aspects of problems in a manner which is in striking contrast to that of the university law professors, who, as a rule, start their academic careers directly after their graduation from universities and, consequently, have no experience of practice.

Conferences of instructors are held approximately once a week at the Institute for deliberation on important problems concerning the training of the legal apprentices.

(2) At the present time the total number of legal apprentices is roughly 550 of whom 26 are women. Their average age is 26. Legal apprentices receive a monthly stipend of ¥12,850 (about $36) plus family allowances,[14] without any obligation being imposed as to their future careers. No payment of tuition is required. This fact is indicative of the importance which is attached to training for the legal profession in postwar Japan. This stipend, it should be noted, exceeds in amount the salary of officials in the administrative branch of government at a comparable stage in their careers. Apprentices, however, are not government employees, though they are entitled to many of the same privileges as the latter.[15]

The apprentices are not allowed to work during the course of their apprenticeship without the express permission of the Supreme Court. Such permission is rarely given. Apprentices are forbidden to divulge confidential information which may have come to their knowledge by virtue of their apprenticeship.[16]

Apprentices may be dismissed from the Institute if they are sentenced to a penalty of imprisonment, or for misconduct, or by virtue of a poor record.[17]

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[14] This amount is considered to be sufficient to meet the apprentice's daily necessities of life.

[15] For example, they are insured by the health insurance system for government employees. In addition, they enjoy the privilege of using the Institute's dormitory at a nominal rent and of obtaining reporters and other official court publications free.

[16] See the Supreme Court Rule Governing Legal Apprentices (Rule No. 15 of 1948, as amended), secs. 2, 3.

[17] See the Supreme Court Rule, *op. cit., supra,* secs. 17, 18.

Since the establishment of the Institute there has been only one apprentice who was dismissed because of the violation of this regulation.

(3) The training period at the Institute begins in April with an opening ceremony attended by the Chief Justice of the Supreme Court, the Minister of Justice, the President of the Japanese Federation of Lawyers' Associations, the Procurator-General, and other outstanding jurists and lawyers. This marks the opening of the first four-month period which is called the "initial training term."

(a) New apprentices are divided into 6 groups each of approximately 50 members. Each group has its own teaching staff consisting of a judge who is a specialist in civil litigation, a judge who has specialized in criminal litigation, a public procurator, a lawyer specializing in civil litigation, and one specializing in criminal practice. Instruction is primarily by the discussion method. As mentioned below, this is in striking contrast to the university law faculties, where the lecture method is the principal method used.

(b) The primary function of the initial collective training period is to orient the apprentices for the field training period which is to follow. An attempt is made to give them a "general and basic conception of law practice (judicial work, prosecution, and private practice)." As mentioned above, on entering the Institute the apprentices are divided into six classes of some fifty students each and five instructors from the various fields described in the previous section are then assigned to each class. After several introductory lectures and visits to trials, actual instruction begins—about five hours being spent each day in the classroom. The following courses are the principal ones given:

(1) Draftsmanship:
  (a) Judgments—supervised by judge-instructors.
  (b) Indictments—supervised by public procurator-instructors.
  (c) Pleadings—supervised by lawyer-instructors.
(2) Lectures on specialized subjects.
(3) Inspection tours to courts, prisons, police stations etc.
(4) General cultural education.

Instruction at the Institute contrasts with that at the universities in that the practical aspects of law, especially developments in case law and problems of fact finding, are emphasized. Because Japan is a country with a codified system of law, in the universities much time is devoted to an explanation of existing statutory law from the theoretical point of view. This training may provide a good basic training in law, but from the practical point of view it is not free from weakness. Theory without practice serves the practitioner but little. Therefore, at the outset of the initial period, the instructors of the Institute try to give the apprentices an idea of how training at the Institute compares and contrasts with the legal education the legal apprentices have received at the university.

One of the most important items in the curriculum is instruction in

the drafting of judgments. In this course each apprentice is given a printed copy of the entire record of a case recently decided by a trial court. Much effort is expended by the instructors, who are judges, to select cases from all over the country which have interesting legal or factual issues which will lend themselves to discussion. The apprentices are required to peruse the record, which contains a summary of all pleadings, testimony, and other evidence offered, as recorded by the court clerk, and upon this basis alone they prepare a "judgment" in which they make findings of fact and state conclusions of law. This process is repeated many times. The apprentice usually has a week or more to prepare his "judgment." The "judgments" are reviewed by the instructor and discussed with the students—at times in the classroom and at other times in personal interviews. This training takes up much of the new apprentice's time and at first gives him considerable difficulty.

Instruction in judicial draftsmanship is not a postwar innovation. The tradition goes back to the training of judicial probationers in the prewar era. Prior to the procedural reforms introduced by the American Occupation, the trial judge played a very active role in the development of a case. He would discuss the pleadings with the lawyers and suggest amendments in an attempt to fix the issues. He had primary responsibility for the examination of witnesses and sometimes he would go so far as to subpoena them *ex officio*. The trial itself was broken up into a series of "oral proceeding" sessions where both pleadings and proof underwent parallel development under the judge's supervision. This system required the judge to be well trained along highly specialized lines. Training in the drafting of judgments was thought to be the best way to develop the requisite skills since it required the student to analyse the entire case carefully and to obtain a good grasp of the essential facts and the legal principles which would control.

In the postwar world this type of instruction is still felt to have great value. For the future judge the skills this work develops remain essential. Also, without a doubt, it is very helpful to the future lawyer or public procurator for it teaches him to analyse a case in detail, and a study of actual records helps the apprentices evaluate the effectiveness with which the examination of witnesses has been conducted.

In similar fashion, instruction in the drafting of complaints, indictments, trial briefs, etc. is conducted by teachers who are lawyers and public procurators.

In addition to this training based on actual records, lectures are also given on selected topics which are of practical importance at present, such as the problems of corporation law, administrative law, labor law, family law, forensic medicine, and criminal psychology. These lectures are given by outstanding scholars and specialists in these respective fields. Instruction by the lecture method at the Institute has been

undertaken in order to give the apprentices both practical and realistic grasp of some contemporary problems which cannot be treated in sufficient detail in universities under the present educational system. Above all, we attach importance to the subject of accounting because cases involving difficult problems of accounting, both civil and criminal, have been increasing in Japan since the end of the War.

Inspection tours to the prisons, securities exchanges, clearing house, mental institutions, and large factories are arranged usually for Saturdays in order to give apprentices some idea of the operation of these institutions with which they otherwise might not come into contact.

A number of hours are allotted to cultural education, in which lectures on literature, religion, and art are given by well-known scholars or other experts. Legal ethics is also one of the subjects. We have some difficulty in finding an effective way to teach it. At present lectures on the Code of Professional Ethics of the Japanese Federation of the Lawyers' Associations are given by our lawyer-instructors, but we are not satisfied that this method is most appropriate.

(c) As the number of subjects has been increasing, the problem of the crowded curriculum has already been raised to some degree at the Institute, and the apprentices are very busy. Still they are advised to attempt some research in at least one specialized problem. The results of such research may be published in the *Shihō Kenshū Shohō,* the law review of the Institute.

(4) After the initial training period has been completed, field training begins at the courts, public procurator's offices, and the lawyers' associations. The President assigns the apprentices to District Courts or District Public Procurator's Offices and the Prefectural Lawyers' Associations, located in cities throughout the country—at present 14 cities in all, and competent judges, public procurators, and practicing lawyers of the respective organizations are appointed instructors for the field training period. To maintain a close connection with the local training program, 100 or more of these local instructors are invited to an annual conference held at the Institute for a day or two to discuss important problems connected with field training. Great care is taken in the selection of local instructors, as the legal apprentices are quite naturally greatly influenced by them. The term of field training is 16 months—8 months at the court (4 months for training in civil cases, 4 months in criminal cases), 4 months at the public procurator's office, and 4 months at the lawyers' association.

It should be noted that we do not have "moot-court" training in the Institute because the legal apprentice can familiarize himself with the realities of litigation through his work during the period of field training.

(a) During field training at the court each apprentice is assigned to a judge of the District Court, who tries to impart to the trainee a

sense of litigation as seen from judicial point of view. He studies actual records of pending cases before trial and attends trials with the judge. He is enabled thereby to observe the conduct of real trials, not moot-trials, through which he can learn how a judge presides at a trial and finds facts. This also gives him an opportunity to observe the activities of lawyers, and he can observe their skill in conducting the examination of witnesses just as though he himself were a member of the tribunal. After the trial is over, he obtains a critique of his fact finding from the judge, and then he drafts the judgment, which the judge corrects. But, as the judges are very busy they cannot give thorough training to apprentices in every case that comes before them. For this reason suitable cases are chosen for training purposes. At a large District Court, such as the Tokyo District Court, a particular judge, different from the one assigned the training of an individual apprentice, will be assigned the task of supervising the training of all apprentices assigned to that court. While in civil cases emphasis is placed upon training in the drafting of judgments, in criminal cases special emphasis is given to assessment of punishment.

(b) During the four months spent at the District Public Procurator's Office, the legal apprentices are given instruction in investigation and prosecution. During this period, they work as subordinates of the instructing public procurator under his direct supervision. They are also taught how to draft indictments, and they attend trials with the public procurators.

(c) Training at the lawyers' associations is conducted principally at law offices. As law firms are almost nonexistent in Japan, individual lawyers are usually chosen as instructors for a particular apprentice, and the apprentices are instructed in advocacy and counselling. They are taught how to prepare complaints, briefs, and other documents. They also attend trials with their instructor and observe the examination of witnesses and the general conduct of the trial from the lawyer's point of view. The instructing lawyer discusses trial strategy with the apprentices after the hearing has been completed.

(5) After sixteen months of field training, the apprentices return to the Institute for a final four-month period of collective training.

The content of the course is similar to that of the initial period. Rough spots caused by the field training in local institutions are smoothed over, and instruction proceeds at an advanced level.

In short, we might say that the initial period is to bridge the gap between university education and practical training, and the final period is to provide some finishing touches. At the end of this final term, there is an examination.

This final examination is conducted by a special committee, the Chief Justice of the Supreme Court being its chairman. A written examination on five subjects, namely civil and criminal judgments, civil and

criminal practice, and prosecution, is given, and this is followed by an oral examination. With but rare exceptions, all apprentices pass this examination. This is not surprising in view of the fact that they have already become well-educated in law through a two-year period of extensive and intensive training.

A commencement is held. It is a ceremonial occasion conducted in the presence of the Chief Justice of the Supreme Court and other distinguished guests.

Graduates of the Institute are qualified to become assistant judges, public procurators, or practicing lawyers; the choice among these three branches of the profession is left to their own determination, but a fixed number of positions in the judiciary and the procuracy are provided by law. Each year a few graduates of the Institute enter the academic life, other branches of the government, or some other profession.

(6) The total number of the graduates from the Institute to date is 2,064. Approximately 600 of these have been appointed assistant judges, about 500 public procurators, and the others have become practicing lawyers. As the Institute is a new organization, none of its graduates have yet accumulated ten years' experience, which is a prerequisite to appointment as a full-fledged judge.

As the number of graduates of the Institute is increasing, they are beginning to exert a discernible effect on the legal profession as a whole. In the first place, young practitioners are better trained in both practice and theory than they were in the past. Secondly, there is an increasing consciousness of integration of the legal profession as a whole. This is, perhaps, the most important result. As mentioned above, it was unfortunately true that in the prewar period the members of the legal profession in governmental and nongovernmental service were educated separately, so there was some feeling of opposition between them. This feeling is now lessening. When all branches of the legal profession are filled with graduates from the Institute, a bar association like the American Bar Association will be organized,[18] and it is hoped that practicing lawyers will become more willing to accept positions in the judiciary regardless of salary.

III. Training of Assistant Judges and Judges of Summary Courts

As stated above, an assistant judge has limited power. At present, however, owing to the shortage of judges, assistant judges with more

[18] In Japan we have a nation-wide organization of lawyers called the Japanese Federation of the Lawyers' Associations and also the prefectural association of lawyers in each judicial district. But there exists no organization of the legal profession comparable to the bar associations in America which include all branches of the profession. In 1952, however, the Association of the Legal Profession of Japan (Nihon-Horitsuka-kyokai) was established which had about 900 members, including leading judges, public procurators, and lawyers.

than five years' experience have been vested with the same power as full-fledged judges.[19]

Each year groups of 25–30 assistant judges are trained at the Institute for periods of one to two weeks. They attend discussions and lectures on selected problems in civil, criminal, and family cases. Fact finding and assessment of punishment are also touched upon. About ten of these groups are brought together each year.

Some judges of the summary courts [20] are selected from individuals of considerable experience and reputation in nonlegal fields. These have not had legal training. They must, therefore, be trained in handling cases. Once each year the Institute gives two-months training to newly appointed lay-judges of the summary courts, who are without previous legal experience. In addition, summary court judges who have already served for some time are brought to the Institute for continuing legal training. About ten of these sessions are held each year. The training programs for assistant judges and summary court judges are carried on by the judges who are the instructors at the Institute.[21]

IV. Judicial Research Programs

Another important function of the Legal Training and Research Institute is to provide a center for judicial research. There are two kinds of research programs for judges.

(1) Conferences are held in which judges discuss contemporary problems of significance in the various fields of law. Labor, commercial, and administrative law cases frequently are the subject of these meetings. At such conferences the judges bring forth problems and research them jointly. The length of these conferences and the number of participants vary with the nature of the subjects; the shortest are four or five days in length and the longest about 10 days, 20 to 30 participants usually attending. Of course, no binding resolution is adopted at this conference. But judges attending, though entirely independent in their own judgment in actual cases, derive much benefit from the discussions at these conferences.

(2) The second kind of judicial research conducted under the auspices of the Institute is the so-called "judicial research plan." Every year five or more judges, including assistant judges, take part in this research program. In this program, judges undertake a problem of law

[19] As of 1957, there were about 1,100 full-fledged judges and about 680 assistant judges.

[20] As of 1957, there were about 716 summary court judges.

[21] In this connection, it may be remarked that there is also another organization under the control of the Ministry of Justice for the continuing training of the public procurators who have graduated from the Legal Training and Research Institute. There is, however, no organization of continuing training for practicing lawyers. The situation is quite different from that of the United States, where many institutes exist for that purpose.

or the administration of justice. Participants are freed from their regular assignments so that they may devote themselves to this research. A characteristic of research undertaken in this program is that it is not merely study of a purely academic nature, but is more practically oriented, being based to a greater or lesser degree on the participants' own experience.

The products of this research are printed and distributed to all members of the judiciary. The subjects selected are, for instance, "How to prevent delay in civil litigation," "Various problems on injunctions in labor disputes," or "Recent landlord and tenant problems."

A number of Anglo-American institutions have been introduced in Japan after the War, and several of these have been the subjects of studies in this research program. For example, "Pleading in Anglo-American Law," "Antitrust Law in the United States of America," and "Legal Ethics and Discipline of Lawyers in the United States of America."

Some of these studies have been very favorably received by the profession.

V. Comments on the Institute

The ideas which foreign scholars and jurists have of Japanese legal education are based primarily on information about legal education in the university law faculties. But, as already noted, the Japanese law faculties are not institutions established exclusively or primarily for the training of those who intend to enter the legal profession. This function is performed by the Institute.

(1) The Institute has been in existence now for ten years. There are some specific points concerning the Institute which need re-examination, but, in spite of that fact, it is generally recognized that the system as such has been a great success.

It is now widely accepted that the graduates of the Institute, whether judges, procurators, or lawyers, are well trained in law and especially able in legal reasoning. This is believed to be due to the above-described training at the Institute in which actual case records are used as teaching materials. Also, in spite of the fact that the two-year period of apprentice training is apparently too short, our graduates have proved themselves adept in handling practical problems. This seems to be due to the well-organized field training they have received.

(2) Since the establishment of the Institute, all prospective members of the legal profession receive the same practical education. As a result, the qualifications of the members of all three branches of the legal profession have been improved, and imbalance of training among branches no longer exists. The conception of separate branches of the legal profession has started to disappear. Ten years from now the alumni association will contain more than fifty percent of the legal

profession, including judges, assistant judges, public procurators, and practicing lawyers. The conception of a unified legal profession will be fostered thereby, and the association will be in a position to exert a great influence on legal education and legal reform in general.

(3) While training at the Institute has already proven successful, there are several problems left to be solved. Some are unique to Japan. Others will be familiar to legal educators everywhere. Some of these problems are summarized below.

(a) Since the law department of a Japanese university is not designed to give professional training for the legal profession, the Institute must be entirely responsible for it.

Generally speaking, up to the present time, the scientific study of law has been carried on primarily by professors in the university law departments. Training of practitioners has been left to the Institute. Professional training, however, must be based on scientific research of a high quality. So the Institute must be fully prepared for such research to be true to the name "The Legal Training and *Research* Institute." Furthermore, the law departments deal primarily with the so-called six basic codes, namely the Constitution, Criminal Law, Civil Law, Commercial Law, Civil Procedure, and Criminal Procedure. The Institute, however, is forced to deal with many other laws. Therefore, it has had to enlarge the scope of study in order to catch up with developments in new fields of law. At the same time, it must continue to give training in legal drafting, and in addition, such new problems as training in cross-examination are now being faced.

The number of subjects to be taught at the Institute is increasing so that two years are becoming insufficient for the training program. How to solve this problem of crowded curriculum has become a question of vital importance.

(b) To be admitted to the American law school, graduation from a university or the completion of a two- or three-year course at a university is required. Famous law schools often require for admission at least the completion of a three-year course. In short, only persons who have already learned liberal arts at the university can receive legal education in law schools.

The Japanese university course is now four years in length, only the first one and one-half to two years being spent in liberal arts training. This term is too short, and to make matters worse, a student who intends to take the National Law Examination is inclined to devote himself to legal study for preparation for this examination at a considerable sacrifice of his general education. This is quite unfortunate, because it is desirable that individuals with better education be admitted to the Institute. Consideration is now being given to revision in the content of the National Law Examination to deal with this problem.

(c) The total number of American law schools is one hundred and odd tens, and that of approved schools is about one hundred and ten; all are organized for professional training, while in Japan the Legal Training and Research Institute is the only organization for professional training throughout the country.

I cannot help envying the existence of so many law schools in America, where so much research and investigation on legal education is being carried out, and where a specialized journal "The Journal of Legal Education" is published for this purpose.

(d) The small number of legal apprentices presents a serious question, even though at the present time there is not much demand to increase the size of the legal profession. The growing complexity of Japanese society has increased the interest of the people in fundamental human rights, and an ever-expanding population will almost certainly necessitate an increase in the size of the legal profession, and consequently in the number of legal apprentices. Professor David F. Cavers, Associate Dean of the Harvard Law School, has visited Japan and made note of this problem.[22] The Institute has completed a statistical survey of the size of the Japanese legal profession. As a result of this survey, we have recently increased the number of apprentices admitted to the Institute.

If, however, the number of legal apprentices should increase to keep up with increasing social demand, the Institute might find itself in a critical position some day because budgetary restrictions might make it impossible to meet expanded costs.

(4) The above-described training of assistant judges and summary court judges and the judicial research program have been quite fruitful. Through these programs, we have been quite successful in stimulating an interest and providing an opportunity for legal research to judges who otherwise would have been confined to ordinary judicial duties.

There are still other questions which remain unsolved, but on the whole the Institute has already done a great deal as a unique center of legal education. While it is still too early to speak definitely about the subject, if that is ever possible, I am confident of the future of the Institute and the role it has to play in Japanese legal education.

[22] Cavers, "Some Impressions of Japan," 11 Journal of the Legal Training and Research Institute (Shihō-Kenshūshohō) 15 (1954) (in Japanese).

Comments

STATUTORY AMENDMENTS OF THE PERSONAL LAW OF HINDUS SINCE INDIAN INDEPENDENCE

Hindu law in India was codified during the period between May, 1955, and December, 1956, in four statutes, namely the Hindu Marriage Act, (Act No. 25 of 1955), the Hindu Succession Act (Act No. 30 of 1956), the Hindu Minority and Guardianship Act (Act No. 32 of 1956), and finally the Hindu Adoptions and Maintenance Act (Act No. 78 of 1956). The process, which it is convenient to call "codification," lacks some of the characteristics of a conventional code, since there remain important parts of the Hindu law which are either entirely or substantially untouched by the legislation. But that portion of the system which has been affected has been so radically affected as to render the result almost unrecognizable for what it is: namely the culmination of a long process of modification and reform, both by way of judicial legislation and by statute, of the ancient legal system indigenous to India and known as the *dharmaśāstra*.[1] The story of the conflicts and heart-searchings which preceded the actual enactment of the statutes has been told elsewhere;[2] but a summary of the motives of the legislators, of the changes they have brought about, and of the results of their work—so far as they can be determined[3] or conjectured[4] from about two years' experience—is likely to interest those who use or study "family laws" in codified form. For it is certain that India's experiment is not less remarkable than the enactment of the Code Napoléon, while nothing comparable with it for width of scope or boldness of innovation has been seen in the Anglo-American systems. The Parliament which enacted the "Hindu Code" has deserved a wide reputation for its radical and even revolutionary legislation; but it is likely that its achievement in connection with the personal law of the Hindus will be amongst its more prominent memorials. The reader may need to be reminded that "Hindus" comprise communities of very widely differing customs and levels of culture, and that the total number of persons governed by the "Code" at the time of writing, though not known for certain, cannot be far short of 400 millions.

[1] The characteristics of this system, and its relationship to the Anglo-Hindu law, with adequate references to current literature, are explained in Derrett, "Hindu Law: the *Dharmashastra* and the Anglo-Hindu law—Scope for Further Comparative Study," 58 Z.f. vergleichende Rechtsw. (1956) 199–245.

[2] Derrett, Hindu Law Past and Present, Calcutta, 1957.

[3] It is curious that litigation on difficult parts of the "Code" has hardly begun to reach the division benches of the High Courts on appeals. We now know, however, that S.14 of the HSA does not confer rights upon alienees from widows who formerly owned property subject to a legal limited estate (see below): but the implications of the same section are hotly disputed between two groups of High Courts.

[4] Examples of such conjectures appear in Indian legal journals, e.g. (1957) 59 Bom. L. R. J. 33 and ff., *ibid.* 68 and ff., and the spate of editions of the various Acts contains quantities of conjecture as to the meaning of really obscure sections. See e.g. R. N. Sarkar, Hindu Marriage Act, Calcutta, 1956; N. D. Basu, Law of Succession, Calcutta, 1957; and D. H. Chaudhari, Hindu Adoptions and Maintenance Act, Calcutta, 1957.

Motives Leading to the "Code"

In the framing of the "Code," we see the uniting of several distinct programs of reform. The legislation was possible not because a majority of the electorate approved either the general proposition of codification or a substantial number of the major innovations, but because amongst the Members of the two Houses of Parliament there were large majorities combining those who believed respectively in the merits of one justification for the project, or perhaps more than one justification, whereas the same members were indifferent or even hostile towards others. It is no secret that the Acts were hastened through Parliament because the dominant party, the Congress Party, was pledged to secure reform of the Hindu law, and the event of the election could not be awaited with perfect confidence; it is equally well known that the educated and "enlightened" minority, which tends to occupy the majority of the seats in the central as well as state legislatures, did not, in passing these Acts, reflect the views of the vast bulk of the Indian public. The horror which is undisguisedly felt by many Hindus at the catastrophe which has befallen their system of family law may not be rationally capable of support, and it may well be true that the reforms were theoretically desirable or even inevitable; but the public accepts the statutes not because they have ardently desired them, but because they have been assured that they are essential if India is to proceed smoothly towards a socialist pattern of society, and, no doubt, because they are habituated to accepting the decisions of the above-mentioned minority as the best thing for them in the long run.

At first it will seem incredible that a "Code" of personal law should be framed and enacted in such circumstances;[5] and it may seem doubtful whether the product can survive. It is true that some amendments and adjustments will have to be made[6] if the "Code" is to work well, as will presently appear, but it is unlikely that any radical alterations will be made until eventually the Indian Civil Code which the Constitution promises us[7] supersedes it. For the motives which conspired to bring it to birth have been satisfied, and there is no longer any unexpended force which can prolong the process or redeem the rather obvious deficiencies in the work. The operative motives were these:

1. Features of the existing law which recognized the institution of caste were inconsistent with the democratization of the country and were therefore to be abolished.

2. For the same reason, rules of law which placed women at a disadvantage as compared with men were to be abolished.

3. For the same reason, customs or other rules permitting large properties to descend to a single heir were thought to be anachronistic.

4. Features of the existing law which tended to hamper free dealing with property were thought to be "backward," and ripe for removal.

5. Some other features were simply "old-fashioned" and quaint, and out

[5] See the comments of Professor A. Gledhill in Constitutional and Legislative Development in the Indian Republic, 20 B.S.O.A.S. (1957) 267 and ff., at pp. 274 and ff.

[6] The one legislative amendment which has already appeared is referred to below.

[7] See Art. 44.

of keeping with the spirit of the times. In particular, certain rules of a particularly religious color or derivation came under attack.

6. Certain topics of law suffered from uncertainty and a scandalous disharmony of decision between the various (and numerous) High Courts, and an opportunity to render certain that which was uncertain or anomalous would be welcomed.

7. Finally, any amendment which would tend to remove the many and striking distinctions between Hindus, and which would appear to render them a more homogeneous and unified people, if only on paper, would be of great political as well as psychological value, and would on that account have an independent justification.

A serious attempt to put all these programs into effect was made in the autumn of 1951, as soon after the inauguration of the Constitution as the pressure of business would permit. Nerve seems to have failed largely because the Constituent Assembly was not fully representative of the people: in other words, the serious doubts of lawyers and laymen alike joined in finding an obvious excuse for not coping with the problem. Pandit Nehru however persisted in his support of the projected code, and bills, brought in separately, were permitted to undergo quite radical amendment in committee and before the Lok Sabha, and the success of the Hindu Marriage Act (so named after objection had been taken to the quite accurate title "Hindu Marriage and Divorce Act") four years after the failure of 1951 at once promised the success, as a legislative venture, of the entire project.

What strikes the observer at once in the new "Code" is the absence of a positive driving force behind it. The Acts vary widely in quality of draftsmanship, and in the proportion of nontraditional matter which they embody. The motives of clearing away the dead wood have had a very full scope, but nothing vital has been put in its place. The justification for the retention of a "personal law" for Hindus in India seems to have been abandoned together with the Anglo-Hindu law which it substantially replaces there; for if the latter was cumbered with faults of every possible sort, it did purport to be an inheritance of the Hindus, and to be derived, if somewhat distantly in places, from the *dharmaśāstra,* which most Hindus were vaguely acquainted with and never failed to respect. The replacement is Hindu in name, and contains an occasional and embarrassing reminder of its predecessor, much as a ruinous but ancient building may be pulled down and replaced with a modern structure, which retains the same street-number, some panelling, a decorative window, or even a quaint chimney pot from the old house, alleging a continuity with the past which may appeal to sentiment, but does not deceive the eye. When readers notice that the Law Minister speaking or writing about one of these Acts claims either that it is really in close accord with the ancient Hindu law, or that it makes no important departure from the existing law, they will not suppose that these misleading statements are due to ignorance. Parliament and the public, whilst aware that something radical was being tampered with, were only too eager to be reassured as to the direction of the movement or the extent of the divergence. As so often with reforms, the desire to break with the immediate past was accompanied by a desire to claim authority from the re-

mote past, and to pretend that innovations are really restorations of something that became corrupted in time. Unfortunately, such claims fail, on the whole, in this context. The "Hindu Code" has little in common with the *dharmaśāstra*, of however ancient a period, and if some resemblance can be discovered it is a coincidence. The advisors learned in the *dharmaśāstra* to whom the Hindu Law Committees turned at various times [8] made no determined effort to reintroduce traditional elements; and where the pre-codification law has been reproduced more or less faithfully, this was not because it was supported by any attractive arguments, but because it found no antagonist. Thus, portions of Anglo-Hindu law, of pre-Independence statutes and trifling scraps of *dharmaśāstra* learning are found cheek-by-jowl with slices of English law, of law which looks English but is not, and of rules which are unprecedented anywhere. Parliament knew that it must busy itself on this subject and must not lose time in so doing, but much of the work betrays an amateurish and improvised appearance. In any other country, this would by now have given rise to alarm and resentment. The authors of such provisions as gave estates to the heirs of living persons [9] would not escape ridicule. But India is a land where the incongruous and the inconsistent is not necessarily intolerable, where "bright ideas" tend to carry as much conviction as ponderous learning, and where the good intentions of the rulers more than compensate for unevenness in their performance. It is in this manner, then, that between 1955 and 1956 Indians, in fact predominantly Hindus, succeeded in removing forever the features of their law which attracted the contemptuous attention of the rationalist and evangelical groups in England; which the legislators of Macaulay's and Maine's days were eager to remove; which acquired a new lease of life as a result of the Mutiny; and which the timidity or indifference of the Imperial Government enabled to survive nearly a century thereafter. One of the first acts of independent India was to rid herself of a burden which the former rulers did not dare to disturb. It remains to be seen whether the public, thus relieved, will live under the "Code" in the spirit which is intended, or whether it will ignore the new facilities that are offered to it, and circumvent the hindrances that are now placed before those that wish to continue in the old (and in some cases apparently harmless) ways to which they were accustomed. We may now turn to the motives individually and see what results they have achieved.

Abolition of Caste

The chief sponsor of the "Hindu Code Bill" claimed that the project would break the supremacy of the "high castes." Whatever the accuracy of this prediction may be, it is certain that the "Code" eliminates most of the contexts in which caste will be referred to in litigation on matters of family law, and to that extent any protection which the Anglo-Hindu law used to afford to the concept of caste, and all that it involved, has ceased. The principal scope of caste-distinction was in the field of marriage. With the

[8] In particular Principal J. R. Gharpure and Dr. P. V. Kane were consulted, but neither attempted to increase the traditional element retained in the draft Bills.

[9] See HSA S.15(2).

very limited exception of Bombay State, there existed a general bar against marriages between persons of different castes, although the Anglo-Hindu law had somewhat mitigated the rigor of the *śāstra* by refusing to recognize more than four castes. This impediment was removed in a statute passed shortly after Independence (Act 21 of 1949), and the reform is re-enacted in the Hindu Marriage Act, 1955 (hereafter cited as *HMA*), sec. 5 and sec. 29 (1). Formerly the most numerous caste, the Śūdras, were entitled to be succeeded as heirs by their illegitimate sons, provided that these were born of concubines in the father's exclusive keeping at the time of conception. In competition with legitimate sons, these *dāsi-putras,* as they were known, were entitled to half the share which each would have had if he had been legitimate, and in competition with the widow, daughter, or daughter's son they were entitled to one half of the estate. This privilege is removed by implication in sec. 8 of the Hindu Succession Act, 1956 (hereafter cited as *HSA*). Whether or not a son was validly adopted might formerly have turned upon the performance or otherwise of certain ceremonies appropriate to adoption; in the case of Śūdra families these ceremonies were not required in every detail, and thus adoptions were in practice somewhat easier to prove. This anomaly is removed by virtue of the requirements prescribed in the Hindu Adoptions and Maintenance Act, 1956 (hereafter cited as *HAMA*), sec. 11. Formerly the adopted son of a Śūdra might share equally with a legitimate son according to certain High Courts, whereas adopted sons of the higher castes were confined to a one-fourth share in competition with a legitimate son of the body. This privilege has been abolished by HAMA sec. 12, so far as relates to adoptions made after the Act came into force. The very capacity to adopt a Hindu child belonging to another caste, unheard of formerly, has been created by the statute (sec. 10). In succession to the separate property of a woman, known as *strīd-hanam,* difference of caste was recognized to the extent that (according to the Bengal school of law) a Brahman co-wife's son would exclude a stepson by a wife of another caste: this rule in practice attracted little attention, for marriages between different castes, except where specially permitted by custom, were generally impossible before 1949, but between 1949 and 1956 a case of discrimination on the ground of caste alone could occur amongst those subject to that particular school. All such possibility is removed in the case of a proposita dying after the 17th June, 1956, by the terms of HSA, sec. 15.

There are two respects in which difference of caste may still be observed, and these have been left, in all probability, by oversight. Formerly, and probably still, no Śūdra could become a *sannyāsi,* that is to say, a religious ascetic, unless a legal custom permitted. Whether a person had validly become a *sannyāsi* is a matter of importance, since upon so becoming a man's property passes as if he had died, and should he accumulate property thereafter it passes to a special order of "spiritual" heirs. The terms of the "overriding effect" section of the HSA (sec. 4) would appear to leave the former law untouched, and the incompatibility of the former law with that set out in the vesting sections of the HSA suggests that, in the case of a member of the higher castes (the "twice-born"), a *sannyāsi* or his relations have a special privilege, for, *inter alia,* estate duty may be levied on the property of those

who die, but not, it would appear, on that of those who have abandoned the world. Śūdras have not been relieved by any provision in the "Hindu Code." Further, a former rule that "twice-born" might be taken in marriage only before their initiation ceremony has been performed (a rule operative outside Bombay State), whereas Śūdras might adopt boys up to their marriages (but not thereafter), does not seem to have been abolished by the HAMA, for that Act provides, in sec. 10 (iv), that a boy above the age of 15 years may be adopted if a custom so permits. The alleged custom will have to be proved, and probably can only be proved (if at all), with reference to caste.

Equality of the Sexes

Formerly, the legal disabilities of women were very striking. The task of removing them commenced as far back as 1937 (a few years earlier in advanced princely states such as Baroda and Mysore), and certain Bombay statutes dealing with marriage and divorce which were roughly contemporary with Independence were followed by enactments in the States of Madras and Saurashtra at short intervals after Independence. The task is almost completed by the "Code," and certain advantages have in fact been left with the previously disabled sex. The principal grounds for attack upon the old law referred to marriage and property rights; the withholding of subordinate rights from women did not give rise to as great an outcry amongst the westernized minority as these, but they are academically at least as noteworthy. Except amongst certain communities of matrilineal history in Malabar, a male was entitled to have more than one wife at a time, whereas a woman was prohibited from having more than one husband. The demand for compulsory monogamy has been met throughout India by HMA, sec. 17. Divorce is available upon various grounds, including the previous marriage of the husband to a woman who is still living, renunciation of the world, living in adultery, and being converted from Hinduism. Judicial separation is now available upon various grounds, including desertion, cruelty, insanity, or a single act of adultery; and the wife may obtain separate residence and maintenance (a remedy introduced first in 1946) upon the grounds of desertion, cruelty, ceasing to be a Hindu, keeping a concubine, etc., and for *any other cause* justifying separate residence (for this last remedy see HAMA, sec. 18(2)). The Anglo-Hindu law had been kind to a wife so far as maintenance was concerned, but, except in the States mentioned above, divorce had not been available in most of the "twice-born" castes, and the grounds upon which a woman might resist a petition for restitution of conjugal rights were uncertain. Now either spouse may obtain an order for the payment of the costs of litigation, and for interim maintenance, out of the property of the other (HMA, sec. 24).

Formerly a mother was inhibited from acting as guardian of her minor child if the father had appointed another person as testamentary guardian, and similarly the mother's own power to appoint a guardian by testament was defective. These anomalies have been removed by the Hindu Minority and Guardianship Act, 1956 (hereafter cited as *HMGA*), sec. 9. The general priority of the father as guardian is however maintained.

Formerly, a female illegitimate child had no general rights of inheritance

and no rights of maintenance at civil law. It appears that an illegitimate daughter may inherit as if legitimate from her mother and her mother's kin (*sed quaere?*), according to HSA, sec. 3(*1*)(*j*), and her rights of maintenance out of her living putative father's estate are established by HAMA, sec. 20(2), and, as a dependent, out of his estate when deceased by sec. 21 and 22 of the same statute.

Formerly, a female could neither adopt to herself, except in the very restricted *kritrima* form known in a portion of one State of northern India, nor be adopted by another. The spinster's, divorcee's, and widow's rights to adopt are established in HAMA, sec. 8, while the capacity of a girl to be adopted is introduced in the same statute, secs. 10 and 11. The adopted child, of whichever sex, is treated in law as equivalent to a legitimate child of the body, with trifling exceptions.

Succession, of all the chapters of the law, reveals the contrast between the present and the past most clearly. Formerly, sons excluded daughters in succession to their fathers, while daughters largely, but not uniformly, excluded sons in succession to their mothers. There were many customs excluding all female heirs, and the various schools of Hindu law varied in the number (it might be as low as five) and relationship of female relatives who might be permitted to inherit. In Madras, for example, until 1929, a sister was 466th in the order of succession, but after a statute of that year she was advanced to 13th in order, after the father's father. Prior to the same statute, she had not inherited in northern India at all, except where local or caste customs permitted it. The widow was often excluded by custom, and it was not until 1937 that, in British India, a widow was permitted to take a share in undivided joint family property, the most common and most important class of property in all India except Bengal and Assam. But even where females were allowed to inherit, they were always, with a few important exceptions in Bombay State, subjected to a limited estate, which seriously impaired their freedom of dealing with the inheritance (see below: Freedom of Disposition). Even where a woman inherited from another woman, who had enjoyed her property absolutely, she took subject to a limited estate. It had even been held by the Privy Council that where a woman who was married or widowed prescribed for a title in property, she prescribed for a limited estate and not an absolute estate; and an old decision of the same tribunal had held it a presumption of law that a legacy to a woman, without qualification in respect of title, would convey a limited and not an absolute estate.

In both respects, the new law is an improvement. Females are admitted as heirs equally with males of the same degree. All property inherited by a female is her absolute property, unless the will or a compromise or decree otherwise provides. And this revolution, perhaps one of the most fundamental in this series, is retrospective, so that the limited estate, which was once a fruitful source of litigation is very nearly a thing of the past. In one respect, females are still discriminated against. Heirs related to the propositus through females, if they are more remote than the mother's sister, will be postponed to heirs related through males, for a residuary patrilineal prejudice still remains. But the discrimination will apply equally to the cognatic males and cognatic females. Not so fair would appear to be the preference accorded

to the father's father over the mother's father, or to the son's daughter's son over the daughter's daughter's son. Once again the female is at no disadvantage, but discrimination between the sex of the stocks remains, and appears to be irrational—for when once members of a family allied by marriage have been admitted there seems to be no justification for preferring a relation one family removed over another who is two or more families removed: see Schedule to HSA.

Formerly a Hindu who had no male issue might adopt a son without consulting his wife, and could give her son away in adoption without taking her consent; she, for her part, could not give or take without the husband's actual or implied consent (the rule depended upon the local interpretation of an ancient and ambiguous text), unless he were insane, in which case she could give away their son freely. A female heir, in the view of the Bengal school of law, was disqualified from the succession if she was 'unchaste' at the time when it opened; a similar disqualification did not apply to a male heir. The first group of rules is abolished, so far as discrimination between the sexes persisted, by HAMA, sec. 7 and 8; and the second disqualification has been removed by HSA, sec. 28. It is to be noted, however, that a husband is not entitled to be maintained out of the estate of his deceased wife (HAMA, sec. 21), and a husband who obtains alimony from his wife in matrimonial proceedings (HMA, sec. 25) may lose it for a single act of intercourse with a woman outside marriage. The latter rule observes parity between the sexes, the former does not.

Formerly women were not permitted to alienate a certain class of *strīdhanam,* though it belonged to them absolutely, without the consent of their husbands, if alive. This rule would seem to have been abolished by sec. 14 of the HSA, as also the rule which enabled a husband to seize and utilize any *strīd-hanam* of his wife in an emergency, even one of his own making, without obligation to repay it unless it were possible and convenient for him to do so.

The freedom which these changes offer to women are likely to have widespread effects, some of which cannot be otherwise than unsettling amongst communities where women have led a sheltered, dependent, and submissive existence for so many millennia.

Impartible Estates

Students of the history of codification elsewhere will be aware that "modernization" has often meant the removal of features from a scheme of succession which smacked of feudalism, and which tended to keep property undivided in the hands of a succession of representatives of a family. India has until recently known numerous examples of hereditary chiefships of various degrees of importance with impartible estates attached to the dignity, and also impartible estates without connection with such official rank. The Congress Party, which always found the Rajas and Maharajas hostile to their programme, pledged itself to the liquidation of their privileges and estates. By various means, which need not be detailed here, the great estates, with a few exceptions in Madras State (where they were protected to some extent by a statute) have been dissolved, and, as a last stroke, the HSA has pro-

vided, in sec. 5, that all estates, except a negligible few, shall descend according to the normal law, and shall thus be partible. An important chapter of the Anglo-Hindu law is thus virtually deleted. Fragmentation, however, is recognized as a menace, and the HSA provides that local statutes impeding fragmentation of agricultural holdings remain unaffected by the reforms.

Freedom of Disposition

As with the English property legislation of 1925, so the "Hindu Code" aims at removing the obstacles which had formerly hindered free dealing with their property by persons who were entitled at law to its enjoyment, but not necessarily to its disposal. In former ages, when movement between classes and occupations was very limited, and large families lived communally upon an undivided corpus of property for several generations, the large number of instances in which an individual was authorized to utilize property for a limited number of purposes but was precluded from alienating it without necessity was not felt as a hindrance to well-being, but rather an advantage. Families are now smaller, the legal standard of freedom allowed to those invested with limited powers of alienation has risen in some cases, and the possibility that transfers of such property will be followed by litigation tends to depress its market value unduly. For all these reasons, the principal instances of limited owners, or persons vested with limited powers of alienation over property not their own or not wholly their own have been abolished or severely curtailed. The female heir who owned an estate subject to the limitation that she might burden it validly for her own maintenance for the payment of the previous male owner's debts, and the repose of his soul, but might not bind the reversioners except in such cases and in cases of pure necessity, such as for the preservation of the property itself, has become a feature of legal history, and the HSA has secured that in the vast majority of cases (at any rate in intestate succession) the property of a female shall be as freely alienable as that of a male. There remains the instance of the manager of joint family property, who was authorized to alienate the corpus of the property for the benefit of the family, for necessity, and, to a limited extent, for pious purposes. As long as the male members of the family were undivided in status, no one ordinarily possessed any right to dispose of the joint property except the managing member, and the limitations upon his power of disposition were embarrassing to alienees, who might be charged after several years with the whole or a part of the consideration, on the ground that the alienation was unauthorized by the law, and in extreme cases the alienation itself would be set aside at the instance of the nonalienating members of the family. The "Hindu Code" tackles this problem in the following way: as regards joint families in Malabar—that is to say joint families predominantly of a matrilineal character—the joint tenure has been prospectively abolished (HSA, sec. 7) and a tenancy in common (i.e. with defined shares) has been virtually substituted for it, for whenever a member of such family dies his interest passes as if it were separate property, and after a few deaths in the family its former constitution will be completely subverted. As regards the vastly more numerous joint families governed by the Mitākharā school of Hindu law, the HSA

provides (sec. 6) that if one of a large number of close relatives survive the deceased his interest will pass as if it were a defined share to the heirs by testamentary or intestate succession, and not by survivorship to joint members of the family as was formerly the case. As a result, accretions of interests to *Mitākṣharā* joint families will henceforth be rare, and the institution will gradually die out, and with it the problem of the limited powers of alienation of the manager—for he too is a moribund institution.

A strange rule of Hindu law allowed a person, who was interested in looking after a child whose guardian he was not, to alienate the child's property validly, provided that the alience took care to ascertain that the alienation was required for necessity or the child's benefit. The power of the *de facto* guardian was strictly limited, and transactions entered into by him have been impeached many years afterwards on the grounds that the alleged necessity did not exist and that the alienee did not take sufficient care to acquaint himself with the facts. The HMGA endeavors, perhaps unsuccessfully, to abolish the difficulty by abolishing the *de facto* guardian. In order to alienate the property of a minor, a guardian must be authorized by the statute, and it turns out that the powers even of natural and testamentary guardians have been somewhat reduced by its provisions (secs. 8, 11).

Modernity

The Anglo-Hindu law had in course of time eliminated many of the characteristic features of the *dharmaśāstra,* but numbers of archaic features survived. Advanced Hindus felt that the limited estate of women, and the legality of polygamy were such features, and these have been mentioned above. The rule enabling a concubine to live, if chaste, a life of ease at the expense of the joint family to which her lover belonged in his lifetime, seems to be old-fashioned, and, whatever merits the rule might have in the eyes of some Hindu communities, it has been abolished by the general provisions of the HAMA. An illegitimate son's right to be maintained for life out of joint family property is similarly abolished. Both these abolitions were to be expected in view of the intended disappearance of the legal joint family, but the motives to remove the rules were not simple. It was old-fashioned that a boy of 14–15 should be entitled to adopt a son, or that a young widow of the same age should be entitled to adopt a man older than herself, that a man should give a son in adoption or take a son in adoption without consulting his wife: all these rules disappear in view of the provisions of the HAMA. That orphans should be incapable of adoption, and that illegitimate children should be kept out of so useful an institution, were accidents derived from the complexion of the antique Hindu adoption law. The orphan, under the HAMA, sec. 9, can now be given in adoption with the consent of the court, and the illegitimate child can be given in adoption, but not received in adoption by its own mother. The rule that an illegitimate daughter cannot be maintained at the expense of the joint family, except with the consent of all interested parties, is a rule of an archaic (if mistaken) origin, and is properly abolished by the general provisions of the same statute.

Rules of a reputedly religious origin which prevented until 1928 any Hindu from inheriting, and since 1928 prevented any Hindu governed by

the Bengal school of law from inheriting, or taking a share at a partition of family property, if he was blind from birth, deaf and dumb, an idiot, or suffered from virulent leprosy, have been abolished by the HSA, sec. 28, and will hardly be missed.

The well-known pious obligation, by which the sons, sons' sons, and sons' sons' sons of a man were obliged to pay his debts if they were not tainted by illegality or immorality, up to the extent of their interests in joint family property—an institution which led to plentiful litigation and which worked anomalously, allowing indirectly acts which the Hindu law itself reprobated directly,—was of a distinctly archaic character, and it was once proposed to abolish it distinctly. Now however the HSA has ensured that the volume of joint family property shall be progressively and rapidly diminished, and therefore the pious obligation is indirectly doomed to extinction. The absurd situations to which it often gave rise had, more than any other abuse, drawn unfavorable attention to the legal condition of the Hindu joint family.

Certainty

Ever since the first textbooks in an European language were written on Hindu law, the complaint has been aired that that system was filled with ambiguities and uncertainties. The earliest judges attempted to impose a certainty where none could be made out from the books then available by giving pragmatic judgments. The process has been mitigated by regard for precedent, and by the skilled investigations of the Privy Council, before whom decisions and texts from all available quarters were regularly cited; but the differences of opinion between the High Courts were astonishing, and the gaps that required to be filled were very numerous. There was even doubt on which sources of law should be referred to to determine how such gaps should be filled, and the interesting source of law called Justice, Equity & Good Conscience provided strange and sometimes conflicting answers. Whether an unchaste woman of the twice-born classes could validly give her son in adoption was never settled; nor whether a man could take in adoption if he were deaf and dumb but the complaint was curable; nor whether an alienation by gift by a manager of a joint family for an unjustified purpose was void or merely voidable; nor whether an alienation could be questioned by a person born several years after it took place, though prior to his birth there had lived two persons with rights to question the alienation, both of whom were now dead, and who had died successively, the latter himself having been born after the alienation; nor whether invincible repugnance was a ground for nullity of marriage; nor, finally, whether an alienation by a non-managing member of a *Mitākṣharā* joint family would carry away, in some parts of India, his share of the property calculated with, or without, reference to the female members who might be entitled to shares in the event of a physical partition. A host of unsolved problems remained, several of them stemming from the earliest days of British administration of Hindu law, and some created by legislation in and immediately after the end of the British period. The wide differences between the Hindu law as administered in British India and in French India point to the capacity for error which the

system had come to possess by the commencement of the 19th century. The "Hindu Code" aims, somewhat precariously, at achieving certainty and unity, and it is to be hoped that after the Supreme Court has had an opportunity to pass opinion on topics which are left ambiguous in the Code that certainty will be much nearer than it has ever been before.

Unity

Formerly, every part of the Hindu law might be abrogated in a specific case by proof of the applicability of a valid custom. The result was a patchwork of rules even in British India. Certain states had enacted codes of Hindu law of their own, and numerous states, small in area and poor in resources, apparently administered Hindu law, if at all, upon lines that had long been obsolete in British India. Some advanced states were well ahead along the road to reform, while others, such as the component States of Malabar had codified matrilineal or otherwise divergent systems in a series of irreconcilable statutes. In the Punjab customs have reigned supreme, whether they were applicable to Hindus, Muslims, or Christians, for they were recorded in respect of practices of agricultural peoples, whose way of life was one, irrespective of religion. The Congress Party, in its struggle for political domination, has always believed in the basic unity of all Hindus. The definition of "Hindu" has always been difficult, because Hinduism possesses no creed or hierarchy, and the law has always regarded individuals as Hindus for the purposes of application of the personal law provided they were not Muslims, Parsis, Christians, or Jews, on the one hand, or members of aboriginal or criminal tribes on the other, provided that the latter term is confined to tribes which have imitated some characteristically Hindu ways but have not adopted a Hindu way of life. The "Hindu Code" assumes that all that do not belong to another religion shall be governed by it, except for the exclusion of what are called Scheduled Tribes, such as the Bhils, Garos, Santals, Gonds, etc., for so long as the government thinks fit. The original intention to abolish all customs inconsistent with the central concepts of the "Code" has not been carried out completely. Malabar customs have been abolished to a very large extent, but a few deviations from the general order of descent and distribution of estates have been allowed to those who would have been governed by the peculiar Malabar systems. Marriage and adoption benefit to some extent by the maintaining of customs so far as will permit marriage within the various limits of prohibited relationship, and will permit the adoption of children above the age of 15 or the adoption of married persons. Nevertheless, many rights are now made available to those who did not enjoy them before, such as divorce, while those who previously enjoyed a right of divorce virtually by mutual consent have retained this right by a special concession (HMA, sec. 29(2)),[10] while a conformity which formerly did not exist has been introduced by way of experiment, the effects of which have yet to be detected. Both the giving and the withholding of rights are bound to have repercussions, especially amongst the less educated communities, who will adjust themselves to the changes more slowly, and the desire

[10] See also Special Marriage Act, 1954, S.15.

for unity, which is a political object, may not in fact be achieved so effectively by this legislation as was anticipated.

The Result

1. Some strangely archaic features remain. Adoption is not possible if the adopter already has a son, or grandson by a son, or, if a girl is to be adopted, has a daughter or even a son's daughter. The state cannot take property as *ultimus heres* until an infinite number of degrees of kindred is exhausted. All through the statutes an appeal to Hindu solidarity is seen, and is strangely inconsistent with the claim that India is a secular state. If a Hindu changes his or her religion, a number of disagreeable results appear. He is liable to be divorced by his wife, he or she may forfeit an existing claim to maintenance, he or she may lose the right to give a child in adoption or to consent to the giving of the child by the other parent, and he or she may lose the right to be the guardian of his or her own issue. The issue of such a person are deprived by his or her conversion of the prospective right of inheritance from his or her unconverted relations. Equally archaic, though much more easy to justify, are the rules enabling persons comparatively remotely connected with a *propositus* or *proposita,* such as a predeceased son's son's widow, to claim to be maintained out of the estate. The intention that individuals shall attempt to stand on their own feet more than was perhaps encouraged previously makes itself seen; but it was obviously too early to deny legal rights of maintenance to people who may be married very early in life, have no qualifications for earning their living, and are prevented by social prejudice from marrying again.

2. Together with these occasional archaic features appears an interesting reliance on foreign legal experience. Numerous rules have been introduced from English law, most strikingly in the HMA which however by no means slavishly copies the English Matrimonial Causes Act. Even in the HSA, numerous rules, such as that providing a *commorientes* presumption, are plainly drawn from England. In the interpretation of certain parts of the HAMA, notably those relating to the matters to which the court shall have regard in determining the rate of maintenance to be paid to claimants, it is likely that English and other Commonwealth decisions on family protection statutes will have to be consulted. The general intention of the HMGA is as far as possible to assimilate the state of Hindu minors to that of non-Hindu and non-Muslim minors in India, and, with a few, though striking, exceptions, the Hindu law of minority will tend to be merged in the Anglo-Indian law laid down in the Guardians and Wards Act, 1890.

3. Though parts of the modern Hindu law retain that independence of litigation which formerly characterized that system, e.g. in matters of adoption, succession, and (where permitted by custom) divorce, where the intervention of the state was far less frequently required than is the case in western countries, the general tendency of the new system is to bring more business to the court, and more work to the hands of lawyers. Though legal tangles over property promise to be less complicated and less hazardous, care will have to be taken in more contexts than was usual formerly to secure the sanction of the Court to a normal act of importance in family life. Even a

natural guardian will on occasions have to journey far to instruct counsel to obtain permission for him to deal with the minor's estate. Before a decedent's estate can be distributed a host of claimants will have to be satisfied, and complicated compromises will have to be worked out if undue fragmentation is not to reduce seriously the value of the estate. If, as is almost always the case, there are minors involved, the court must be approached for consent, and even uncontentious litigation costs time and money. This marked alteration in the character of the law by no means displeases the reforming section of the community, who feel that it is consonant with India's march towards modernity.

4. In the course of the drafting of the bills which subsequently became the "Hindu Code," and the passage of these bills through both Houses of Parliament, a process which took much time and involved the contribution at various stages of many minds, some of which seem to have been applied to the task rather hurriedly, numerous slips were intruded into the text. One of the problems set by the HSA has already been treated exhaustively but inharmoniously by most of the High Courts and another was corrected by Act 73 of 1956. It would serve no useful purpose to detail or even illustrate the mistakes here. Some of them are very obvious, while some may be capable of being counteracted by judicial interpretation. The topic has been dealt with elsewhere. Countries other than India which administer Hindu law, i.e. Pakistan, Burma, Malaya, and East Africa,[11] may have much to learn from both the successful and the less attractive features of India's "Hindu Code", but it will be some time yet before the new system emerges sufficiently clearly from judicial exposition and normal practice for its merits to be appreciated correctly.

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[11] See Hindu Law in Kenya, A.I.R. 1958 Journal 1–6.

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REFORM AND CODIFICATION OF POLISH LAWS

The work of the codification commission, begun in December 1956, marks the fourth attempt to reform the Polish laws since the reconstitution of Poland in 1918. In spite of the changes in the regime, the purposes and aims of all these codification efforts bear a striking similarity and are closely related to each other. In 1918 Poland inherited a territory divided into five separate jurisdictions and a tradition that the fall of the old republic, partitioned at the end of the eighteenth century, was due to the poor laws and inefficiency of its government. Therefore, one of the first acts of the reborn nation was to create a codification commission to produce good uniform laws for the entire country.

It was obvious, however, that various matters required immediate attention and could not wait for drafts from the hands of the highly competent codification commission, and government departments originated laws which provided regulation where it was urgently needed, taking into account the changed conditions and providing unification indispensable for the very operation of the government.

The first codification commission, proceeding according to the best tradition and technique of the great codification projects of the nineteenth century, worked by means of questionnaires, reports, and discussions, and in the course of the years prepared drafts of bills which gradually equipped Poland with uniform basic laws. The fruits of its labors included procedural codes (criminal and civil), substantive criminal law, important elements of the civil code, a commercial code, laws on the judiciary (including public prosecution), the bar and public notaries, two laws on the conflict of laws, and a code of administrative procedure. When World War II broke out, the work of the codification commission was well advanced but far from finished.

After the war, the legal situation in Poland again called for a concerted effort to reorder its laws. Poland acquired new provinces in the west, and the first measure was to introduce Polish laws, as they existed in the western provinces of Poland on the eve of the war, in the new territories. The government then proceeded to enact new laws to replace the remaining regulations inherited from the partitioning powers. Some of the laws enacted at that period were the product of the first codification commission, while others were prepared, sometimes hastily, by departmental experts.[1]

By the end of 1946, the unification of Polish laws was practically accomplished, and the final step could be taken to integrate the various scattered pieces of legislation dealing with private law into a single civil code. In 1947 the minister of justice set up a commission to produce a new civil code for Poland. This commission, a somewhat more modest version of the first codification commission, made drafts for various parts of the civil code, which appeared in print and were circulated for wider discussion and observations. On the whole, the new proposals followed the same line as those of the earlier commission, but as the work progressed it became clear that the drafts had no chance of being enacted into laws. After the commission was set up, the country experienced a change of regime. The economic system changed from free enterprise to the socialist order of economy; public administration, industrial labor relations, and the administration of justice were reshaped; and a vast program of nationalization of industry and commerce was executed. It was admitted that the new reality would require a different type of legal regulation and that the codification of civil law would have to wait until the process of transition was over. The change in the social and economic order also deeply affected the ideological orientation of the ruling circles. The law of interwar Poland had been inspired by the legal thought of the Western civil-law countries. As the process of transition unfolded, it became apparent that the model for the transformation of public life and economic activity and for the various regulations which were hastily

[1] Grzybowski, "Continuity of Law in Eastern Europe," 6 American Journal of Comparative Law, (1957) 63, note 28. *Cf.* Baade, "Die Privatrechtsgeographie Ost—und Südoststeuropas seit 1938," 7 Jahrbuch für Internationales Recht, (1957) 332 *et seq.* Wolter A., Prawo Cywilne, Vol. I (1955), 43–44. *Cf.* Geilke, "Die Entwicklung des polnischen Justizrechts seit Kriegsende (1945-1951)" 2 Zeitschrift für Ostforschung, (1953) p. 107.

enacted by various governmental agencies was provided by Soviet laws and institutions.[2]

Owing to the peculiar legislative technique which was employed, the scope of the legal reform which came on the heels of the revolutionary changes in the public life of Poland may be gauged only with difficulty. Many of the regulations which vitally affected important areas were issued in the innocuous form of office instructions, internal regulations, or circular letters. For instance, the penitentiary law was changed by an unpublished regulation issued by one of the ministries, a law of collective agreements by a circular letter from the Central Board of the Trade Unions, and the sale of real estate was prohibited by an instruction in a circular letter addressed to the notaries public. This hardly contributed to the stability of laws and of private rights, particularly as the laws were constantly being revised and amended (e.g., the code of civil procedure was amended twenty-five times in the postwar years).

By the end of 1950, the regime considered that the foundations of the socialist order had been laid in Poland, and on September 27, 1950, the government instructed the minister of justice to prepare new criminal and civil codes. The minister of justice set up a commission under his chairmanship, consisting almost exclusively of departmental experts.[3]

The general part of the criminal code was ready in 1951. It was circulated among interested circles and was then sent back for reworking. The full draft, including a special part, was published in 1955.[4] The minister of justice, reporting on it to the December 1955 convention of the Polish Lawyers' Association, stated that its purpose was to confirm and embody in one legal enactment the "achievements" of the past period. As the minister explained:

> It was based on the experiences of the administration of justice and the legal developments in Poland in the course of the last ten years, and it drew from the experience of the Soviet Union and from that of other people's democracies, particularly Czechoslovakia, Bulgaria, and Hungary.[5]

The work on the civil code progressed in a more leisurely fashion. The first draft was prepared in 1954. It was circulated and criticized in the legal periodicals, and after redrafting it appeared in print in 1956. It was also the result of Soviet inspiration and covered property relations, contracts, torts, and inheritance.[6]

On October 17, 1951, the minister of justice created two additional commissions, one to prepare a code of criminal procedure, the other a code of civil procedure. The draft of the civil procedure code appeared in print in 1956. In the same year the draft of the code of criminal procedure was

[2] Wasilkowski J., "Kodyfikacja prawa cywilnego w Polsce," Nowe Prawo (1950) No. 12, pp. 3–7; Szer S., "Unifikacja prawa rodzinnego i cywilnego," *ibid.*, (1954) No. 7–8, pp. 30–38; Andrejew I., "Przeglad rozwoju historii polskiej mysli kodyfikacyjnej w dziedzinie prawa karnego," *ibid.* (1954) No. 7–8, pp. 16–24.

[3] Monitor Polski, No. a–106/1939.

[4] Wolter W., "Ultima ratio kodeksu karnego," Prawo i Zycie, January 1, 1957.

[5] Trybuna Ludu, December 3, 1955.

[6] Introduction to the Draft of the Civil Code.

circulated in multilith form. Some of its provisions were enacted in December 1955 as a part of the reform of criminal procedure.[7]

The Central Board of Trade Unions sponsored the preparation of a draft of a labor code in order to do away with the multitude of scattered legislation on labor questions. It was never published as it was found completely unsuitable for Polish conditions.[8]

The work of the codification commissions of the period of 1950–1955 was swept away by the events of 1956. After the December 1955 convention of the Polish Lawyers' Association, public attention was focussed on the state of Polish laws, and, with the creation of a new legal periodical, *Prawo i Zycie* (Law and Life), the discussion and criticism of the legal situation gained momentum. It soon became obvious that a normal functioning of courts and the protection of human rights would not be possible without a fundamental reform.

In order to meet the needs of the moment and to placate public opinion the Council of Ministers issued, on August 23, 1956, an order setting up a new codification commission which was instructed somewhat vaguely:

> to prepare basic drafts of codes in the field of activity of the agencies of the administration of justice, in particular, civil and criminal codes, codes of criminal and civil procedure, and laws on the judiciary and the organization of the bar.[9]

Again history repeated itself, and it was necessary to enact various interim legislative measures to provide immediate relief in the difficult situation in which the administration of justice found itself. The minister of justice, addressing the first meeting of the codification commission on December 17, 1956, stated that amending legislation was urgently needed in three major fields of the administration of justice. In the first place, in order to improve the qualifications of the judicial personnel, the period of practice in courts for candidates for judicial positions was extended, and a bar examination for judges was introduced; in order to provide independent management of the internal business of courts, a general meeting of judges was created in each court, and an administrative council elected by the general meeting was established. Next, it was necessary to mitigate the severity of criminal emergency legislation introduced in the postwar period, which had survived until then. Thirdly, the criminal procedure and the law on release on parole had to be changed.[10]

The wording of the Order of August 23, 1956, was understood to leave the way open for other projects. The detailed instructions issued by the minister of justice in this connection mentioned all fields of judicial law, and provided for the possibility of charging the commission with the preparation of drafts of laws not included in the original program.[11] The scope of the deliberations of the codification was expanded very quickly. During his speech to the commission, the minister mentioned the penitentiary law as one of the

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[7] Panstwo i Prawo (1956) 417–418.
[8] Kakol K., "Pilna sprawa, kodeks pracy," Prawo i Zycie, January 1, 1957.
[9] Monitor Polski, No. 70/856.
[10] Panstwo i Prawo (1957) 6 ff.
[11] *Ibid.* (1957) 5.

items on the commission's agenda, while the move to include a draft of the law on administrative courts in the commission's activities came from the Polish Lawyers' Association. The National Executive Board created a commission for the judicial control of administrative acts, which prepared a questionnaire including topics for public discussion. This questionnaire was published in July 1956 preparatory to a national conference on the subject of judicial control of administrative acts, which was held on November 12, 1956. A set of proposals, including the creation of special divisions for administrative cases in the provincial courts and the supreme court, was made at this conference.[12]

The work of the codification commission began in an atmosphere of urgency. The first reports on its progress, which came out in March and April, 1957, indicated that considerable progress had already been made. The commission was organized in nine teams, each in charge of a major piece of legislation: civil law, substantive criminal law, criminal and civil procedures, the conflicts of laws act, and laws on the judiciary, the bar, government attorneys, and administrative courts.

The division of labor between these teams does not exclude their crossing lines to consider certain topics central for the operation of the entire mechanism of the administration of justice. Some questions require uniform treatment in many pieces of legislation, and the position of the courts, of government attorneys, and of legal counsel in civil or criminal cases is determined in civil and criminal procedures as well as in the laws establishing the status of the individual institutions in the entire setup. It appears from the reports on the progress of work of the codification commission that there is little if any controversy between teams working on related subjects.

The fundamental agreement of the members of the codification commission was apparent from a broad discussion of the shortcomings of the laws in force. Unlike the labors of the first commission which were carried on in an atmosphere of calm and academic detachment, the labors of its successors of our time are surrounded by the general interest of the legal profession and the public at large.

In the course of discussion, practically no axiom which was considered fundamental for the socialist order in Polish law was spared criticism. It was admitted that the slavish imitation of Soviet law and institutions had disastrous effects in Poland. The dogma that socialist law is more nearly perfect only because it is the law of a higher stage of social development was thrown overboard. On close consideration the present situation in Poland was found to be far below the standards achieved in the past. One of the critics admitted:

> In 1956 our minds go back to the legal situation under the rule of the partitioning powers in Poland one hundred years ago. The Russian judicial reform of 1864 seems to be more than we can afford at present.[13]

It was pointed out that the state of Polish criminal law, in which the imitation of the Soviet pattern was perhaps more uncritical than in any other

[12] Prawo i Zycie, December 16, 1956, *Ibid.* March 10, 1957.

[13] Grabowski, "Nowobrany Sejm i reforma sadownictwa powszechnego," Prawo i Zycie, January 27, 1957.

province of legislation, was particularly unsatisfactory. As one of the leading members of the codification commission wrote, the Soviet criminal code was a particularly inferior piece of legislation. Conceived not as an independent effort of Soviet scholars, but under the influence of the Italian positivist school, it was from the beginning a clinical example of poor legislative technique, lack of clarity, bad organization, and improvisation. Constantly amended and supplemented, it represented a conglomerate of penal provisions which should not have been imitated in Poland.[14]

Under the impact of these unhappy experiences, Polish legal thought turned to the Polish tradition. The minister of justice encouraged the commission to seek inspiration in the work of its predecessor. Soviet legal achievements were dismissed as practically without significance, having contributed little if anything to the development of socialist legal concepts. Socialist legal thought, the minister continued, has not as yet achieved the same precision of legal formulation as that of capitalist lawyers, and much effort will be required before comparable results can be achieved. In particular, the definitions of criminal acts peculiar to the socialist economic order will require a great deal of work which must start from scratch. Socialist lawyers are faced with a dilemma. On one hand, excessive penalization of the economic life must be avoided, as experience has proved that this leads to depreciation of the law and of the authority of the courts. On the other hand, attacks against the specific interests of a society with a socialist economic system cannot go unpunished.[15]

Quite naturally, therefore, the work of the commission proceeds in an atmosphere of critical examination of the borrowings from Soviet legal experience.

The tendency to restore the situation as it existed in the interwar years is perhaps most apparent in the work of those teams which are concerned with the organization of courts and judicial procedure, which in turn will vitally affect the role of government attorneys and of the defence.

The central problem is to assure the independence of the courts and their supremacy in the administration of justice. Several measures have been proposed. In the first place, judicial districts should not coincide with administrative divisions, thus making courts into a separate hierarchy of authorities unrelated to the administrative setup. Permanent judicial personnel should be appointed and not elected, and laymen should disappear from the bench except in the most important cases (probably only criminal).

In order to assure full protection of the individual rights of citizens, the courts should be given complete control of all stages of criminal proceedings. Here two solutions are advanced. Either to restore the prewar situation and to place pretrial investigation in the hand of the courts (investigating judge), which would have exclusive right to impose arrest and order a search or an interception of the mails, or, if these powers are to be exercised also by other authorities, to institute appeal from their decisions to the court.

It has been proposed that the courts again be made the chief guardians of legality and of private rights, perhaps even more consistently than in the

[14] Wolter W., *op. cit.* n. 4.
[15] Panstwo i Prawo (1956) pp. 417 ff.

interwar years. The teams of the codification commission dealing with administrative courts and the judiciary act seem to lean towards a single system of courts with civil, criminal, and administrative divisions. The courts would also hear appeals from the penal decisions of the administrative authorities. There is even a chance that economic arbitration of disputes between governmental enterprises might go to the courts.

The supervisory role of the Supreme Court as the main instrument for assuring the uniform enforcement of laws would receive new emphasis. It is planned to make the Supreme Court more accessible to private parties, and to reintroduce regular appeal from the courts of appeal, while drastically restricting extraordinary appeal (reopening of cases) in order to avoid double jeopardy. In addition, the Supreme Court will continue to issue directives on the interpretation of dubious points of law to the lower courts. It is proposed, however, that neither the minister of justice nor the attorney general shall have the right to move that the Supreme Court issue such directives. This right shall belong exclusively to the Chief Justice of the Supreme Court.

These reforms would have a vital effect on the position and role of government attorneys, as they would no longer control pretrial proceedings and act as guardians of the general enforcement of laws.[16]

There is no less criticism of the institutions received from Soviet legal experience in the field of substantive law. The new approach will be primarily reflected in the systematic arrangement of the criminal and civil codes.

As regards the criminal code, the wisdom of distinguishing between attacks on government property and those on private property has been placed in doubt. Consequently, there is no reason to divide the special part of the code into two parts: one containing punishable acts directed against the state and the regime, including crimes against government property, and the other, those directed against the rights and persons of individuals. This distinction, which has been adopted in the Albanian (1952), Bulgarian (1952), and Czechoslovak (1950) criminal codes, and which was also a feature of the Polish draft of 1955, is unlikely to appear in the draft of the codification commission.[17]

Other issues taken under advisement by the commission which may affect the organization of the future criminal code are crimes of the military and the treatment of juvenile delinquents. Should these two matters be excluded from the criminal code there would be little to distinguish it from the codes of the free world.[18]

It has also been announced that the future criminal code will not adopt the Soviet type of punishment by correctional labor, but will rely on deprivation of freedom as its main form of criminal repression. In all penal systems, convicts have the duty to work, and the Polish criminal code will not differ on this point. However, as it was pointed out, labor holds too high a rank in a socialist society to make it a form of punishment. The real purpose of the

[16] Prawo i Zycie, March 10, March 24, and April 7, 1957.

[17] *Ibid.*, March 10, 1957. See also, Wolter W., *op. cit.* Prawo i Zycie January 1, 1956. Gutenkunst "Niektore problemy kodyfikacji przestepstw przeciw wlasnosci," Panstwo i Prawo (1957) No. 10, p. 572.

[18] Prawo i Zycie, March 10, 1957.

decision of the codification commission was to prevent the abuse of convict labor to the extent that this has occurred in the Soviet Union under the humanitarian pretext of the educational qualities of labor.[19]

Otherwise, however, many other points which may vitally affect the character of the future criminal code are still in the dark. The Code of 1932 permitted wide individualization of punishment by the court, depending upon the intensity of the criminal intent of the culprit. Only occasionally, when expressly allowed by the code, did the insignificant amount of the damage justify judicial grace. The objective elements of crime, except those which were expressly provided for by law, and in particular the amount of damage caused, were not among the circumstances (extenuating or aggravating) which *per se* influenced the sentence imposed by the court. It must be pointed out, however, that objective circumstances had their place in the system of the Code of 1932. The extent of social danger determined whether an act was prohibited under the sanction of penalty, and determined the upper and lower limits of the penalty.

Under the influence of the Soviet criminal doctrine, Polish courts in the postwar years have confused these two approaches, increasingly tending towards imposing penalities (for most important crimes) according to objective criteria and relegating, in determining the degree of guilt, the intensity and nature of intent to a secondary place. Although this practice was criticized,[20] it is not certain that the new Polish code will follow the tradition established by the Code of 1932, as recent directives of the Supreme Court (October 1957) on the prosecution of crimes against government property continue the practice contrary to its principles.[21]

The future civil code will in all probability realize the original design of the drafters of the Polish civil law to codify all civil law in a single law. Contrary to Soviet practice, therefore, domestic relations will be included in the civil code. The commission also plans to include the general principles of insurance law and a special part on transactions between the enterprises of the socialized sector of economy.[22]

Similar tendencies are visible in the work of the team writing the draft of civil procedure. In the first place, the inquisitorial powers of the court in civil suits, as they were formulated under the civil procedure of 1950, are likely to be restricted to conform to the principle of the free disposal of rights by the parties in a civil suit. Similarly, the position of the government attorney, and his powers in a civil suit between third parties, will, in all likelihood, be redefined, while the tendency is to restore the equality of parties in civil suits involving governmental institutions and private persons.[23]

The problem of administrative courts and their procedure in a socialist

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[19] Slowo Powszechne, February 6, 1958.

[20] Lustacz Leon, "O pozakonstytucyjnych formach dzialalnosci prawotworczej" Panstwo i Prawo (1957) No. 7–8, pp. 6–7. *Cf.* also Dobrzanski Bronislaw, "Nadzor judykacyjny Sadu Najwyzszego." Nowe Prawo 1957, No. 9, p. 3.

[21] Prawo i Zycie, November 3, 1957.

[22] *Ibid.* March 10, 1957. See also Wolter Aleksander, "Wspolny majatek malzonkow de lege ferenda," Panstwo i Prawo (1957) No. 10, p. 558. Szer, *op. cit.*, Nowe Prawo (1954) No. 7–8, pp. 30–28.

[23] Prawo i Zycie, March 10, 1957.

state controlling all aspects of the economic life of the country by administrative action, is of extreme importance if the rule of law is to be put on realistic foundations. Jurisdiction of administrative courts must necessarily be conceived much more broadly in a socialist country than in a country in which economic activities are free to private entrepreneurs. It seems to be the consensus of opinion that the Soviet system in which the only remedy against an illegal act of an administrative authority is a complaint by the injured party to the government attorney is not suitable for Polish conditions. Once this principle has been accepted, the discussion is confined to the question of what categories of disputes may be profitably included in the business of the administrative courts. One of the most pressing questions is that of providing a channel of adjudication for disputes arising from the decisions of the housing authorities who administer urban housing. It has also been proposed that social organizations be authorized to initiate suits before administrative courts in matters within their chartered activities.[24]

The team working on the reform of the 1926 act on the conflict of laws (international private law) has approached its task from a new angle. The law in force was designed for a free economy and has been found lacking in a system in which certain types of trade and of property constitute a government monopoly. To adapt the law to changed conditions is the main task of the codification commission.[25]

The commission faces a Herculean task of restoring the simple, precise, and concise language of the earlier laws. Legislators of the post World War II period paid little attention to the craftsmanship of legislative work and thought it could be easily replaced by general statements of the political purpose of the law. No less important in this conscious departure from the technically correct drafting of the laws was the desire to avoid a too precise definition of rights and duties, or of crimes and limits of responsibility, in order to leave a wide margin for flexible enforcement of laws to suit current policies of the regime. Poor craftsmanship was considered a virtue, and interwar legislation, in particular the Criminal Code of 1932, was criticized for its technical and precise definitions, which were unsuitable for the new social economic order. Now that the protection of individual rights and a strict determination of governmental powers have again been discovered to be indispensable for the orderly administration of government, precision of legal thinking and of formulation have regained their place in legislative techniques.

The work of the commission is characterized by a conscious effort to continue the Polish legal tradition and the codification work begun in the interwar years. The legislative techniques, the return to liberal institutions, and a realistic appraisal of the economic and social conditions of the country indicate that its approach will be cautious and free from doctrinal anticipation of the future in terms of legal provisions designed for some still nonexistent social structure. Hence, the emphasis on professional qualifications for members of the legal profession, whether on the bench or at the bar. Thus, for instance, the future law on the bar will probably be free from terminology

[24] *Ibid.* March 10, 1957.
[25] *Ibid.* April 7, 1957.

stressing political conformity at the expense of professional qualifications.[26]

At the same time, the new legislation, judging by its present outlines, will take due account of the fact that the government continues to control all industrial enterprise, and that trade and distribution constitute an almost exclusive field of government monopoly or control. It is argued that government ownership alone does not prevent the rule of civil law, even in fields where the government is the sole entrepreneur. Indeed, if anything, it is indispensable there, as by its very size government participation in the administration of the economic resources of the country affects the lives of everybody. Polish lawyers have come to the conclusion that even in a socialist economic system the alternative to untrammeled rule by bureaucracy is a return to the regulation of business transactions by civil law.[27]

It is of course uncertain whether ideas which have the support of the codifiers of Polish laws will see the light in the form of statutes. Legal scholarship, keen comprehension of the realities of social conditions, a search for solid foundations for the rule of law are not necessarily virtues in the eyes of a political leadership which fears the limitation of governmental power which the rule brings with it. Drafts of future codes will have to pass the scrutiny of the regime, and this may mean a final product falling far short of the ideal.

KAZIMIERZ GRZYBOWSKI *

[26] *Ibid.* April 7, 1957.

[27] Buczkowski, "O wlasciwa role prawa cywilnego w gospodarce uspolecznionej," Panstwo i Prawo (1956) 249–262. Brus W. Prawo wartosci a problematyka bodzcow ekonomicznych (Warsaw, 1946) 88ff. Majzel J. "Tworcze poszukiwania polskich ekonomistow," Trybuna Ludu, July 1, 1956. Majzel J., "O umowach dostawy miedzy jednostkami gospodarki uspolecznionej," Panstwo i Prawo (1956) 378.

* Editor, European Law Division, Law Library of Congress.

THE CHINESE COUNCIL OF GRAND JUSTICES

The Constitution of the Chinese Republic, promulgated January 1, 1947,[1] introduced a newly created organ, the Council of Grand Justices, in the Chinese judicial system. Both in organization and in function, the Council of Grand Justices is somewhat similar to the pattern of the constitutional courts in Continental Europe, such as the Federal Constitutional Court (*Bundesverfassungsgericht*) of Western Germany [2] and the Constitutional Court (*Corte Costituzionale*) of the Republic of Italy.[3] The purpose of this paper is to introduce this novel Chinese judicial institution to Western readers.

I

According to the Organic Law of the Judicial Yuan of 1948, as revised on December 3, 1957,[4] the Council of Grand Justices is to be composed of

[1] The Government of the Republic of China on Formosa (Taiwan) is now operating within the framework of this Constitution, although its operations are confined to the territory under its control owing to the Communist occupation of Mainland China.

[2] See Basic Law for the Federal Republic of Germany (1949), Arts. 93, 94.

[3] See Constitution of the Italian Republic (1947), Arts. 134–137.

[4] Arts. 3, 4.

seventeen Grand Justices, who must have one of the following qualifications:

(1) Previously served as a Supreme Court Judge for not less than ten years with an excellent record;

(2) Previously served as a Member of the Legislative Yuan [5] for not less than nine years with a special contribution;

(3) Having been a university professor teaching main law courses for not less than ten years and being an author of works on special legal study;

(4) Previously served as a Judge in the Permanent Court of International Justice or author of authoritative works on public law or comparative law;

(5) Having studied law and being rich in political experience and widely known for his achievements.

The number of Grand Justices to be appointed from any one of the above-mentioned categories is limited to one third of the total number allotted.

A Grand Justice is to be nominated and appointed by the President of the Republic with the consent of the Control Yuan.[6] At the time of the inauguration of the Council, viz., in July, 1948, only twelve Grand Justices were appointed with the consent of the Control Yuan.[7] Since three vacancies have occurred owing to resignation or death of the original appointees after that date, eight additional Grand Justices were newly appointed in March, 1949, to fill these three vacancies and the other five original vacancies, thus bringing the total number of Grand Justices to seventeen as required by law. But before they could seriously go to work, the National Government moved to Formosa (Taiwan) in December, 1949, and only two reported for duty when the Judicial Yuan [8] began functioning again in Taipei. Owing to the lack of a quorum, the Grand Justices did not meet for no less than three years. In March, 1952, obviously pressed by the urgent demand to have the Council of Grand Justices interpret some pending constitutional questions, Messrs. Huang Cheng-ming, Hsu Pu-wan, Wang Feng-shun, Tseng Shao-shun, Tsai Chang-ling, Han Chun-chien, and Ho Wei were appointed Grand Justices, who together with two original appointees, Messrs. Ho Po-yu and Su Hsi-hsun, constituted the necessary quorum required by law for the functioning of the Council. It is these nine Grand Justices who have exercised the functions of the Council of Grand Justices since 1952 to the present time.

The tenure of office of a Grand Justice is nine years.[9] Although it is not expressly stated in the law, it is presumed that an incumbent Grand Justice

[5] The Legislative Yuan is the highest legislative organ of the State composed of popularly elected Members, exercising the legislative power on behalf of the people (Constitution, Arts. 62–64).

[6] Constitution, Art. 79, paragraph 2. The Control Yuan, composed of Members elected by provincial and municipal councils, is the highest organ of the State, exercising the power of consent, impeachment, censure, and auditing (Constitution, Arts. 90, 91).

[7] Among seventeen nominees suggested by the President, five were not given consent by the Control Yuan. See China Handbook 1954–55, Taipei, 1954, p. 178.

[8] The Judicial Yuan is the highest organ of the State with jurisdiction over civil, criminal, and administrative cases and over cases concerning disciplinary punishment of public functionaries. In addition it is also empowered to interpret the Constitution and to unify the interpretation of laws and ordinances (Constitution, Arts. 77, 78).

[9] Art. 5 of the Organic Law of the Judicial Yuan as revised on December 3, 1957.

is re-eligible upon the expiration of his term.[10] In the event of a Grand Justice's office becoming vacant, according to Article 5 of the newly adopted Organic Law of the Judicial Yuan, his successor holds office only until the expiration of the original appointee's term. Accordingly, all the terms of the nine Grand Justices now in office, whether as original appointees or as successors to original appointees, should be regarded as having expired in July, 1957. To the date of writing, April, 1958, the members of the Second Council of Grand Justices have not been appointed; it is, however, expected that appointments will be made in the very near future.

II

The functions of the Council of Grand Justices are provided by Articles 78 and 79, paragraph 2, of the Constitution as follows:

Article 78—The Judicial Yuan shall have the power to interpret the Constitution and also the power to unify the interpretation of laws and ordinances.

Article 79, paragraph 2—The Judicial Yuan shall have a number of Grand Justices to attend to matters stipulated in Article 78 of the Constitution. . . .

From these provisions, it is clear that the functions of the Grand Justices are twofold: (1) to interpret the Constitution; (2) to unify the interpretation of laws and ordinances. On the meaning and scope of these functions, the Council of Grand Justices in its Interpretation of Law No. 2 says:

> "As is provided in Article 78 of the Constitution, the Judicial Yuan shall have authority to interpret the Constitution and shall also have the power to unify the interpretation of laws and ordinances. In the case of the Constitution, the term used is to interpret, while in the case of laws and ordinances, the term used is to unify the interpretation. Obviously there is a distinction in the terminology. . . . If any Central or local governmental organ in the course of its functioning as such should entertain any doubt with respect to the application of the Constitution, such organ may apply directly to the Judicial Yuan for interpretation. The same is true where there is doubt whether or not a given law or ordinance is in conflict with the Constitution. But in case of doubt concerning the application of laws or ordinances, the Central or local governmental organs shall themselves study the problem to find out the true meaning of the law or ordinance concerned and see that it is properly applied. They are not permitted on any pretext to apply to the Judicial Yuan for interpretation. Uniformity in interpretation is deemed necessary only where the governmental organ holds an opinion concerning the application of the law or ordinance which is at variance with the opinion previously expressed by itself or another organ concerning the

[10] A number of the Members of the Legislative Yuan introduced a bill in May, 1957, to revise the Organic Law of the Judicial Yuan so as to make Grand Justices ineligible for reappointment. Although approved by the Committee on Organic Laws of the Legislative Yuan on May 23, 1957, this bill provoked serious controversies in political as well as academic circles and finally was rejected by the Legislative Yuan in its second reading on November 29, 1957. See Chung Yan Jih Pao (Central Daily News), May 21, 24, 1957; November 30, 1957.

application of the same law or ordinance and where such organ is neither bound by law to abide by such opinion previously expressed nor given the right to make changes therein. In this case, unless uniformity is secured, the interpretation of the same law or ordinance would be at such a divergency as to entail different legal consequences. It is only under such a condition that an application may properly be made for unifying the interpretation." [11]

According to the above-cited interpretation, the functions of the Council of Grand Justices may be classified into three categories: (1) simple interpretation of the Constitution, that is, to determine what the pertinent constitutional clause means; (2) review of laws and ordinances, that is, to decide whether the law is or is not in conformity with a constitutional provision or reasonable implication from such; [12] (3) uniform interpretation of laws and ordinances, that is, to unify the divergency of opinions as to the interpretation of laws and ordinances among the governmental organs. It is to be noted that in all these three cases, only the central or local governmental organs are permitted to apply for interpretation, and individuals as such are not allowed to raise constitutional issues directly as in the United States.[13]

According to the Rules of Order of the Conference of Grand Justices, when a matter of interpretation is filed with the Judicial Yuan, it will be assigned by rotation to one of the Grand Justices for study and deliberation. If it is outside the scope of interpretation, he shall make a report to the meeting recommending its dismissal. If it is within the scope of interpretation, he shall prepare a statement of facts and points of law involved and submit the same to a meeting of Grand Justices. After the principle on which the decision is to be based has been determined at the meeting, the matter will be referred to the original Justice or to a group of Justices including the original one who will write the opinion, which shall be submitted to a meeting for decision. A meeting of Grand Justices is held fortnightly with the President of the Judicial Yuan as *ex officio* chairman. Two thirds of the total number of Grand Justices residing at the seat of the Central Government constitute a quorum and at least a majority of those Grand Justices residing at the seat of the Central Government must concur before a decision is made.[14] A decision of the Council of Grand Justices is transferred to the

[11] Published by the Judicial Yuan on January 6, 1949.

[12] Under the present Constitution of the Republic of China, the legal system of the State, as a whole, constitutes a hierarchy of different legal norms. Article 171 of the Constitution provides: Laws that are in contravention of the Constitution shall be null and void; Article 172 provides: Ordinances that are in contravention of the Constitution or laws shall be null and void.

[13] The Rules of Order of the Conference of Grand Justices (as adopted by the First Meeting of Grand Justices on September 15, 1949, and revised on April 14, 1952), Arts. 3, 4.

[14] This part of the Rules of Order was introduced by the Council of Grand Justices in its first meeting held in Taipei on April 14, 1952. Since that time, only nine Grand Justices have been residing in Taipei, the seat of the Central Government of the Republic of China, so it means that six Justices constitute a quorum and at least five Justices must concur before a decision is made. This Rule was modified by Article 6 of the Organic Law of the Judicial Yuan (as revised on December 3, 1957) in respect of the interpretation of the Constitution as follows: "Interpretation of the Consti-

Judicial Yuan for publication and to inform the governmental organ which asked for the interpretation.

III

Since its inauguration, the Council of Grand Justices has rendered a total of seventy-nine interpretations of the Constitution and other laws. A bird's-eye view of these interpretations can be obtained from the following two tables. Table I shows what kinds of laws and how many of them were interpreted by the Council of Grand Justices during this period. Table 2 shows what kinds of governmental organs asked the Council of Grand Justices for interpretation.

TABLE 1

Kinds of Laws interpreted	1949	1950	1951	1952	1953	1954	1955	1956	1957	Total
Constitutional Law	2	0	0	3	11	5	0	0	4	25
Administrative Law	0	0	0	3	2	1	5	4	4	19
Civil Law	0	0	0	1	4	5	2	4	1	17
Criminal Law	0	0	0	3	0	2	6	4	0	15
Other Laws	0	0	0	0	0	1	0	2	0	3
Total	2	0	0	10	17	14	13	14	9	79

TABLE 2

Kinds of Organs asking for interpretation	1949	1950	1951	1952	1953	1954	1955	1956	1957	Total
Central Government	0	0	0	4	6	4	8	9	3	34
Local Government	1	0	0	2	4	3	0	1	1	12
Courts	1	0	0	3	2	5	3	0	0	14
Control Yuan	0	0	0	1	3	1	1	2	0	8
Examination Yuan [15]	0	0	0	0	0	0	1	2	1	4
Local Assemblies	0	0	0	0	0	1	0	0	3	4
Others	0	0	0	0	2	0	0	0	1	3
Total	2	0	0	10	17	14	13	14	9	79

From these tables we can get some clearer ideas concerning the functions fulfilled by the First Council of Grand Justices. These may be summarized as follows: (1) After two interpretations were rendered on January 6, 1949, there were no interpretations until May 21, 1952, owing to the lack of a quorum. Seventy-seven additional interpretations were rendered during the period from 1952 to 1957, an average of 13 a year, or one a month. (2) Of these seventy-nine interpretations, only 25, or almost 32%, related to the interpretation of the Constitution, while the other 54, or almost 68%, related to the uniform interpretation of laws. It may be said from this point of view that the Council of Grand Justices has done more in the field of maintenance of the unity of laws than in the field of constitutional interpretation. (3)

tution shall be made by consent of three-fourths of the Grand Justices present at a meeting having a quorum of three-fourths of the total number of Grand Justices."

[15] The Examination Yuan is the highest examination organ of the State, attending to matters such as examination, appointment, evaluation and ranking, service rating, checking of records, salary scales, promotion and transfer, safeguarding of tenures, commendation, compensation, retirement, and pension (Constitution, Art. 83).

Of the 25 interpretations of the Constitution, 19, or 76%, were rendered in the period from 1952 to 1954. The reason for the concentration of so many cases in these three years might be found in the fact that when the Council of Grand Justices began functioning again in 1952 in Taipei, there were many pending constitutional questions to be interpreted. (4) It is to be noted that all these 25 interpretations of the Constitution were rendered to supplement or clarify the deficiency or vagueness of the original Constitutional provisions and none was given to review the constitutionality of laws or ordinances. Obviously, this is due to the present Rules of Order of the Conference of Grand Justices; it cannot, however, be denied that the Rules may impair the solemn status of the Council of Grand Justices as "the guarantor of the people's rights and liberties." (5) More than half the interpretations, that is, 58%, were submitted by the Central or local governments, 18% by the courts, and 24% by other governmental organs, such as the Control Yuan, Examination Yuan, or local assemblies.

In the following paragraph, some of the more important interpretations are noted, and a brief comment made on them.

IV

(1) Interpretation of Law No. 3[16]—The issue in this case was whether the Control Yuan is or is not empowered to present statutory bills to the Legislative Yuan with respect to matters under its jurisdiction. According to the constitutional express provisions, only the Executive Yuan[17] and the Examination Yuan may present statutory bills to the Legislative Yuan, and there is no such provision in the case of the Control Yuan.[18] In this case, the Council of Grand Justices held: "Viewed in the light of the late Dr. Sun Yat-sen's theory of separation and balance of five powers[19] and also in the light of the minutes of the Constitutional Convention, the Control Yuan shall be deemed to have the right to present bills of legislation to the Legislative Yuan, insofar as matters under its charge are concerned." This Interpretation, however, has been criticized by some scholars as a groundless grant of unwarranted power to the Control Yuan by the Council of Grand Justices.[20]

(2) Interpretation of Laws Nos. 1, 15, 19, 24, 30, 74, 75[21]—These cases concern the problem of incompatibility of several public offices. According to

[16] Published by the Judicial Yuan on May 21, 1952.

[17] The Executive Yuan is the highest administrative organ of the State responsible to the Legislative Yuan (Constitution, Arts. 53, 57).

[18] Constitution, Arts. 58, 87.

[19] According to Dr. Sun Yat-sun's theory, the governmental powers shall not only be divided into five categories: executive, legislative, judicial, examination, and control, but also be exercised by five independent and co-ordinate organs: the Executive, Legislative, Judicial, Examination and Control Yuans.

[20] See Mon-Wu Sah, "On the Amendment and Interpretation of the Constitution," Free China, Vol. VII No. 2 (July 16, 1952); Chin-sui Liu, Elements of the Constitution of the Republic of China (Taipei, 1957) 195–196.

[21] These interpretations were published by the Judicial Yuan on January 6, 1949; April 24, 1953; June 3, 1953; September 3, 1953; January 15, 1954; March 22, 1957; and April 8, 1957, respectively.

these interpretations, Delegates to the National Assembly [22] may hold governmental posts outside their constituencies (No. 75), but no Delegate may concurrently be a Member of the Legislative or Control Yuan (Nos. 15, 30), or of a local assembly (No. 74); on the other hand, no Member of the Legislative or Control Yuan may concurrently be Delegate to the National Assembly (Nos. 15, 30) or hold any governmental post or the office of a director, supervisor, or general manager of a public business (No. 1, 19, 24).

(3) Interpretation of Law No. 31 [23]—This case concerns the term of office of Members of the Legislative and Control Yuans. According to the Constitution, the legal term for Members of the Legislative Yuan is three years, of the Control Yuan, six.[24] Members of both Legislative and Control Yuans were elected in 1948, so their terms would expire in 1951 and 1954, respectively, and new elections should have been held. It was, however, impossible to hold a nation-wide general election owing to the evacuation of the National Government from Mainland China to Formosa (Taiwan) in 1949. Such being the case, it was strongly desired that some effort be made to fill this legal gap and to maintain the legitimate continuity of the governmental functions. This was done by the Council of Grand Justices in its Interpretation of Law No. 31, in which it was held that under such an extraordinary emergency, the Members of both Yuans elected in 1948 might exercise their functions continuously until the general election should be held.

(4) Interpretation of Law No. 14 [25]—The issue in this case was whether or not the representatives elected by the people are subject to impeachment by the Control Yuan. In this interpretation, the Council of Grand Justices held: "By the provision of the Constitution, the Control Yuan may exercise its control powers only over officials of the Executive, Judicial, and Examination Yuans and public functionaries employed by the Central Government or by any of the local governments. It can be said with certainty that representatives elected by the people are not primarily intended to be subject to the control powers. Therefore, Delegates to the National Assembly and Members of the Legislative and Control Yuans or of local assemblies are not deemed officials subject to the jurisdiction of the Control Yuan."

CHIN-SUI LIU *

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[22] The National Assembly, composed of popularly elected Delegates, shall exercise political powers (such as election, recall, initiative, and referendum) on behalf of the whole body of citizens (Constitution, Arts. 25, 26).

[23] Published by the Judicial Yuan on January 29, 1954.

[24] Constitution, Arts. 65, 93.

[25] Published by the Judicial Yuan on March 21, 1953.

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Book Reviews

L'Évolution du Droit Public. Études en l'Honneur d'Achille Mestre. Paris: Recueil Sirey, 1956. Pp. xiii, 574.

This important volume is a tribute to Achille Mestre, honorary professor at the Paris and Toulouse Faculties of Law, on the occasion of his 80th birthday. It contains thirty-six studies signed by some of the most eminent French professors of Public Law, colleagues and former students of Professor Mestre.

The articles comprising the volume are arranged in alphabetical order according to the authors' names. They cover the fields of Public international law, European law, Administrative law, Fiscal law, Constitutional law, and Political Science. The title of the volume appears somewhat deceptive in the sense that the contributors have not taken the evolution of public law as their exclusive theme. The merit of the work, however, consists in the intrinsic value of every single contribution, the number of challenging ideas developed by several authors, as well as the opportunity given to the reader by the very composition of such a volume to "pace" the territory occupied by public law at the present.

In our days when the complexities and the changing face [1] of modern societies have exploded many of the distinctions neatly traced by the Romans, the boundaries of public law are difficult to define on both sides of the Atlantic. In this country, Dean Ribble, among others, once wondered whether public law was not that part of the law for which the public shows the greater interest, that "mixture of applied politics and current events." [2] On the continent, many authors have pointed out—with emphasis or with complaint—the continuous "publicization" of private law.[3] While the uncertainties of the subject matter would not warrant a thorough analysis of the content of the "public law" concept as understood in the United States and in the civil-law countries, the cross-section of public law subjects, which compose the present volume prompts certain observations.

Outwardly, the domain of public law in France seems to have remained unchanged. The reform of legal studies of 1954 was limited to the *licence* [4] and the main subjects of one of the graduate courses have remained the same: constitutional, administrative, and international law. But the internal changes undergone by these branches of the law undoubtedly have affected the concept of public law, as it was understood forty years ago.

While the enforcement of the rules of international law and the influence exercised by international organizations on world peace today are as open to

[1] *Cf.* the article by Professor Reuter, p. 459.

[2] F. D. G. Ribble, Dean, University of Virginia, Department of Law, Journal of Public law, vol. 1 number 1, p. 2.

[3] See for instance: Savatier, Du droit civil au droit public, 1950; Ripert, Le déclin du droit, 1949, no. 11 ssc.; Rivero, "Droit public et droit privé, conquête ou statu quo?," D.H. 1947, chron 69.

[4] Tunc, "New Developments in Legal Education in France," 4 Am. J. Comp. Law (1955) 419.

question as ever, the field of international law has, nevertheless, expanded tremendously since Fauchille's days. Air law [5] annexes space law. We are witnessing the creation of a European law.[6] The need for distinguishing administrative [7] and economic international law from constitutional international law is increasingly felt. Professor Reuter observes (pp. 448) that, by now, the number of international organizations (about 150) whose "international personality" has been recognized (International Court of Justice, Advisory opinion of April 11, 1949) is larger than that of all the sovereign states taken together (less than 90) and, consequently, that international law can no longer be defined as a law "between" states based on an idea of coordination, since the very concept of international organizations is an implied acknowledgment of the existence of a power superior to that of the national states. Finally, the increase of international agreements has multiplied the instance of international law problems relevant to domestic law, both private [8] and constitutional.[9]

The *Conseil d'Etat* has created an autonomous French administrative law [10] in the field of government contracts [11] and in that of civil responsibility incurred by the state and its organs, thus considerably expanding the field and increasing the substance of administrative law. French constitutional law, however, has thinned out, leaving to political science the problem of finding the answers to many questions once considered the exclusive province of constitutional lawyers. Present political regimes can no longer be identified by the analysis of national constitutions since, today, the rules observed by political life are not, in fact, those provided by constitution. In France, for instance, notes Professor Burdeau (p. 54), the political parties and "the coalitions of private interests," which play such an important role in the political and constitutional life of the country, are not even mentioned by the Constitution of 1946. "When one reads in the constitution of the Soviet Union," writes Mr. Burdeau, "that the superior organ of power is the Supreme Soviet, one is, to say the least, amazed that the Supreme Soviet can perform its tasks meeting for just a few hours every year. But one does not consider it to be a violation of the constitution that the true power is situated elsewhere than where the constitution says it is." "Similarly," continues Professor Burdeau, "no one complains that the United States constitution is being violated when the President determines foreign policy by simplified executive agreements; when the Congressional Committees interfere with the work of the Administration, or when the concept of separation of powers is being substituted by concentration of authority, because, says the author, the American Constitution is no longer a rule of law but a symbol."

While, probably, no valid conclusions can be reached by including in a

[5] *Les civilistes,* of course, claim air law as a branch of private law; *cf.* 1 Colin-Capitant, Traité de Droit Civil, 1953 at 20.

[6] *Cf.* the articles of Professors Cavaré and Pelloux.

[7] *Cf.* the articles of Madame Bastid and Mr. Reuter, especially pp. 445 and 446.

[8] *Cf.* the article of Judge Basdevant at 9.

[9] *Cf.* the articles of Messrs. Pinto and Rousseau at 437 and 473.

[10] *Cf.* K. H. Nadelmann, "France: Choice of Law in the 'Conseil d'État," 2 Am. J. Comp. Law 533.

[11] *Cf.* the articles of Professors Vedel and Laubardière.

general statement the constitutions of East and West, and while the examples chosen by Professor Burdeau in American constitutional life might certainly be challenged, one should agree that, with qualifications varying for every country, constitutions, more often than not, are no longer the frame which contains political life; this, in fact, develops rather on the fringes [12] of the constitution. This explains, says Mr. Burdeau, the growing interest in political science that, unrestricted in its means of investigation, is more apt to account for reality than does constitutional law with its present investigation of mere scholarly principles or rules devoid of any concrete significance.

Professor Duverger's essay (pp. 211–221) offers an interesting example of a problem which once belonged to the exclusive province of constitutional law: the question of political representation. The author stresses the unsuitability of the private law concept of "mandate" for the fulfilment of the democratic requirement of a "government by the people." He finds that the French Parliament reflects the *opinions* of the electorate but not its will, since it is the Parliament and not the electorate that elects the government. Mr. Duverger proposes other procedures which might enable the French voter to do more than express his ideological opinions (socialist, communist, catholic, etc . . .) that is, to make a direct choice of the governmental team, comparable to the choice made by the British electorate.

Labor Law, traditionally considered as belonging to private law [13] makes its appearance with a single, but forceful, article written by Professor Charlier.[14] After describing these features which place *le droit social* within the province of private law (free relations between individuals dominated by the idea of personal interest) and those which make it a part of public law (the guiding idea of *esprit de service,*) the author observes that the originality of this relatively new branch of the law consists in the fact that it is situated beyond the classification of public-private, thus illustrating the deep unity of the law. Professor Charlier adds that the distinction between private and public law has often been exaggerated, partly because, in France, it corresponds to the traditional classification between private and public law departments in the law schools (p. 76).

The same idea (also professed, in the past, by Professor Mestre in his studies concerning the nature of "juristic institution") is shared by Professor Reuter (p. 457). He cites a multiplicity of examples taken from the relationship between the various international organizations and the national states from legal transactions (contracts, loans, etc. . . .) taking place between the same international organizations and private citizens of different nationalities. He remarks that all these new legal relationships can no longer fit into

[12] "Today," says Mr. Burdeau, "the Constitution is no longer the origin and the foundation of the legal order; it is just a link, useful but not indispensable, in the process of the 'realization' of the popular will."

[13] *Cf.* Colin-Capitant, 1 Traité de Droit Civil, 1953 at 21; Jean Carbonnier, 1 Droit Civil, 1955 at 39.

[14] Mr. Charlier says that the state-labor antagonism, both in capitalist and in communist countries, stems from the intervention of the state and will not be resolved except by a reverse process whereby the workers (management included) will intervene in the direction of the governmental functions. The objective, or ideal, of the new type of society towards which we are slowly moving should be the achievement of a *civilisation du travail.*

the classical distinctions international-municipal law or into those traditionally made among the different branches of internal law. In his conclusion, Professor Reuter compares the system of every international organization to that of a member-state in a confederation suggesting that the internal systems of the present international organizations represent just embryonic fragments of what, by a process of expansion and unification, might become a global federal order.

Thus, while as already noted, these studies dedicated to Professor Mestre do not discuss the evolution of public law, some do invite the reader to weigh the changes undergone by the different branches of public law and even point to the possibility of an over-all change of the centuries-old classification of the law.

There is certainly no wonder that such a prediction should come from those who, in France, are called *les publicistes*. By their chosen field, the public-law lawyers are indeed nearer and hence more sensitive to those "current events" which alter the political structure of our national and international society as well as the very foundations of public law as we have known them previously. The domain of public law has been the state and the problems of its organization and its relations. Until now, however, the state, the object of study in public law, has been, politically, a self-sufficient unity. This no longer seems to be true. In the words of an editorial: "Every land on this shrinking globe is becoming the colony of other lands. There is no longer one utterly independent state as was common a century ago."[15] Law, hindered by the inertia inherent in its function, which is to stabilize, can not move swiftly. But the time has come, if not for the law, at least for the lawyers to help find more appropriate ways and forms for the new world in which we already live.

G. M. RAZI *

DURAND, C. *Les Rapports entre les Jurisdictions Administrative et Judiciaire.* Paris: Librairie Générale de Droit et de Jurisprudence, 1956. Pp. xvi, 506.

The book—Volume II in the series: *Bibliothéque de Droit Public*—stresses the idea of the collaboration of the two judicial systems in France: that of ordinary (common-law) and administrative courts.

As a starting point, the author considers in this parallelism so characteristic for the French governmental organization a simple division of judicial activities having nothing to do, in the present status of French legal development, with the notion of the separation of governmental powers. This assertion is fully approved by G. Liet-Veaux, professor of the Faculty of Law of the University of Rennes, France, in his preface to the book: "If the administrative judiciary satisfies this name it cannot be considered as part of the executive, and the (doctrine of the) separation of governmental powers can serve only to confront it with the executive and not with justices of judicial courts (*juges judiciaires*). If, on the contrary, administrative judiciary is a misnomer, and, in reality, part of the executive, then, it is the idea

[15] C. L. Sulzberger, "Interdependence and What it Means," The New York Times, December 30, 1957.

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of the separation of powers that makes it distinct from the judicial branch of government; in this case, however, we cannot speak of administrative judiciary (*contentieux administrative*) any more." There is only one possibility to solve this dilemma, and Mr. Durand concurring with Professor Liet-Veaux, opted for the right solution: "to leave the notion of the separation of powers in the domain of constitutional law, and to keep in the domain of courts (only) certain principles referring to the division of competences."

Preceding this statement, the preface of Prof. Liet-Veaux approves also another leading proposition of C. Durand: "The restoration of the time-honored idea of *res judicata*."

Indeed, the author considers of outstanding importance that courts belonging to the two legal systems in question mutually have to respect each other's decisions essentially in the same way as in the case between courts of the same type.

For all of them the notion of *res judicata* covers above all a final decision that has become nonappealable. Yet a judgment or other sort of definitive judicial decision possesses already the authority of *res judicata* (*chose jugée*) even if still appealable. Such a decision is already taken into consideration in the interrelations of the two French judicial systems. Distinction is to be made, however, between the negative and the positive effects of *res judicata*. The first is expressed in Article 1351 of the French *Code Civil* requiring identity of the object of the judgment, of the parties in the case, and of the cause upon which the case is based in order to enjoin a court from reviewing a case already decided by another court. The same idea is expressed in criminal cases by the notion of *non bis in idem*. Taking as an instance activities of criminal courts proper on the one hand, and administrative tribunals of disciplinary cases on the other hand, both aim at applying a punishment (identity of the *object*) when calling the same defendant to account (partial identity of the *parties*). The opposing party, however, is not exactly the same before the two types of courts. In criminal cases it is the same: the state attorney who represents society in general; and in the disciplinary procedure a narrower social group, for instance a professional group, as would be in the case of a physician. The identity of the *cause* may be analyzed as the factual and legal identity of the act for which the defendant is tried. This identity never exists simultaneously in regular criminal and disciplinary cases because it is one thing to punish for a criminal act covered by the penal code, and another to apply legal consequences to activities not conforming to professional standards.

The author eventually concludes that the negative effects of *res judicata*, though they are of "immense" doctrinal importance, play only a restricted role in interrelations between regular (common-law) and administrative courts. But what about its positive effects?

These mean an obligation of a court not to hold against a previous judicial decision, without, however, precluding a decision on the merits of the case. Such an injunction exists only when the identity of object, parties, and cause constitute the negative effects of *res judicata* as reviewed above. Yet, legal security demands that previous judicial decisions be taken into account even if one or all of the three kinds of identities are absent.

It depends on the nature of the particular case whether the second court bases its rulings exclusively on the previous judicial decision, or whether it uses it only as part of its own reasoning.

The author reviews extensively the problem when a court solicits the decision of another court before ruling. It is notable for the collaboration of the two—common-law and administrative—systems that the French *Conseil d'État* decides upon the questions solicited even if a common-law court would have had authority to solve the question by itself, and refuses to decide only if it absolutely lacks legal authority to consider the case. The most outstanding example is that of the French criminal courts which are authorized and even obliged by statutory dispositions to rule on the legality and applicability of an administrative order containing penal provisions; nevertheless, they often solicit the decision of the *Conseil d'État* regarding its legality. The *Conseil* certainly has statutory authority to make such a decision and, therefore, advises the other court even if the request was unnecessary. A refusal based on this fact would mean that the *Conseil d'État* overrules the court of another judiciary system, and thus does not pay respect to its decision.

The soliciting court, in turn, is bound to base its own decision upon the administrative court's ruling. It is no more authorized to overlook it than is the *Conseil d'État*.

In addition, the author covers the vast area of other forms and instances of collaboration based on *res judicata*. We wish to recall in this respect the role of the *Tribunal des Conflits*. It puts an end to situations when courts belonging to different judicial systems both deny that they have authority to decide in the same case. (*Negative* conflict of attributions; *positive* conflicts when the authority was asserted by both courts is of no interest to the author.) The *Tribunal des Conflits* indicates one of the courts as having legal authority and thus eliminates the deadlock caused by the fact that the parties could not find a court to consider their case.

In an interesting part of the book, the author reviews the unsolved lack of collaboration between a regular law court and the *Conseil d'État*, the one deciding upon the liability for damages of private persons, the other upon that of the government due to the same accident. Although the second court is bound, according to the notion of *res judicata*, to accept the facts as established by the first, the legal consequences applied according to different sets of substantive law, may result in an unhappy contradiction.

The final part of the book deals with the obligation of the Executive, controlled by the *Conseil d'État*, not to elude, directly or indirectly, the implementing of judicial decisions. In this respect, the author sees virtually complete collaboration between administrative and judicial courts.

The author is optimistic in his conclusions that future legal development will still promote the collaboration between the two court systems. Certainly, his book did a good service in this respect. A select bibliography, a listing of judicial decisions of both types of courts, as well as detailed alphabetical and analytical tables of content, contribute to the usefulness of the book.

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SCHLOCHAUER, H. J. *Öffentliches Recht.* Karlsruhe: C. F. Müller, 1957. Pp. xvi, 267.

This volume would arouse the greatest interest and respect for its author, even if Hans-Jürgen Schlochauer did not fill four positions of importance in present Germany's public life, and especially within the legists' guild: he is not only professor of law at Frankfurt's Goethe University and director of her well-known Institute of International Economic Law, but also a member of the Hessian High Court of Administration, managing editor of the *Archiv des Völkerrechts,* the German opposite to our own AJIL, and presently editor of the new edition of the *Enzyklopädie des Völkerrechts* (to be published by de Gruyter, Berlin).

By the somewhat lengthy subtitle of the book, the author delimits and defines his purpose and field of concentration. The work is divided into two major parts—fundamentals of federal state law (*Grundzüge des Bundesstaatsrechts,* and of general administrative law (*Grundzüge des allgemeinen Verwaltunsgrechtes*) while the 17 chapters are numbered in numerical sequence.

In his preface Schlochauer explains the purpose of his book and the method applied. Since the young Federal Republic actually has not to date produced a comparatively brief treatise in the field of public law, the author feels justified to state—and rightfully, we admit—that his achievement fills a gap. His book, however, refrains from dealing with the era before the now famous year Zero. The concentration of the discussion is steered toward federal law: *Staatsrecht* (public law) of the individual *Länder* had to be omitted, while their administrative law is treated in its fundamentals; international law comes under discussion insofar as it forms a part of the Federal Republic's own constitutional law. Certain fields, enumerated under the heading "public law" by the traditionalists, have not been included: criminal, procedural, and ecclesiastical law. Naturally, Schlochauer did not omit the procedural rules, applied in the Federal Constitutional Court and in the administrative courts.

For Anglo-American readers, the author's explanations of the differences between the German-continental theories and the English views concerning public law will be of greatest interest. Especially the German school did much philosophizing in that field notwithstanding the great "outsider" —*sit venia verbo*—Kelsen, who declared every and any law to be of public character. Schlochauer enumerates the four principal doctrines, summarizing their tenets: (1) the Roman theory of interest, distinguishing *quod ad statum rei Romanae* (public), *quod ad singulorum utilitatem* (private) *spectat;* (2) the theory of subjects: any legal act involving the participation of the state or of one of its agencies belongs to the sphere of public law, any other to that of private law; (3) Gierke's so-called *Dreiteilungstheorie* distinguishing by reference to the object protected by the norm and the sphere: community, social organization, individual; (4) theory of the *selbständige Lebenskreise* (independent spheres of life), somewhat related to Gierke's doctrine.

Schlochauer is inclined to assume a mediating viewpoint: he feels that the German school has adopted a dogmatic, positivistic, and, to a certain

extent, enumerative outlook. German public law will, as it were, introduce itself as such and say so. Constitutionally, Montesquieu's principle of the separation of governmental powers has become German law, written into the *Grundgesetz* (Basic Law), but not completely: like Congress, the Federal Diet is in charge of declarations of war and concludes peace treaties,—acts that are left to the monarch as chief executive in constitutional monarchies. Since 1946, the administrative judicature has been completely split off from the administrative, i.e. executive branch of government, and has become a part of the general judicature in the Federal Republic. On the other hand, the judiciary is in charge of administrative acts as to judges and law courts (*Justizverwaltung*) and is in charge of certain administrative activities of nonjudicial character, although connected with any ministration of the law: summoning of witnesses, policing of the courtrooms, execution of criminal sentences, and certain tasks of administrative character in the field of the probate courts.

The author introduces each chapter with an exhaustive bibliography covering the topic of the chapter; literature before the year "Zero" i.e., 1945 is rarely quoted. He would not be the excellent German scholar he is, if each opening paragraph did not offer a short historical development of the matter treated. It is quite impossible to discuss every interesting problem or detail in such an *opus* within the frame of a book review. Yet, there are certain points which ought to be mentioned since they also may offer topics for arguments in an American classroom:

Schlochauer most definitely omits any mention of the German Democratic Republic, as the "other" Germany calls itself, or of the *Ostzone* as it is called by the—German—"Westerners." The author certainly follows the official West German and allied philosophy by proclaiming the Federal Republic as a *non-Staatsfragment* (p. 11), but has to admit that the expression *Grundgesetz* instead of *Verfassung* has been elected because all the "founding fathers"—to use an American expression—then had been most conscious of the temporary and incomplete character of the founding act and the state to be founded, on the one hand, and of the one great allied partner absent, on the other hand: the Soviet Union. Thus, the Federal Republic remains somewhat an *état incomplet,* to use an expression coined by Talleyrand. The accession of the "missing" *Länder* would take place according to a mode that resembles the admission of new states to the union in our own Constitution.

The author points out explicitly that the racial laws of the Hitler state have become obsolete and do not influence the laws concerning nationality any longer (p. 29), but in the opinion of the reviewer in the paragraph on *Deutsche Volkszugehörigkeit* the nonracial character of the respective regulations should have been more clearly accentuated (pp. 30, 31), since the German expression alone had been used almost exclusively by Nazi jurists and politicians up to 1945. We congratulate professor Schlochauer for his masterful explanation of the delicate subject, *Die öffentlichen Lasten* (ch. 15), and the even more delicate subchapter *C* about expropriation. The immediately following chapter deals with indemnifications. The historical approach is praiseworthy, but what, we may wonder, happened in those years

1933 to 1945, when public law certainly superseded private law as far as certain minorities were concerned, and by administrative acts property, movable or immovable, was seized, transferred, mortgaged, and human beings taxed (*Reichsfluchtsteuer*), arrested, exiled, deported, and destroyed? Even the alphabetic index lacks the concepts: *Wiedergutmachung, Konzentrationslager, Nürnberger Gesetze*. That the Reichsgericht should have confirmed an indemnification claim as late as April 11, 1933 (p. 231) is certainly interesting, but what about the subsequent era?

However, these are minor shortcomings. For everybody who wishes to know about the public law of the Federal Republic, Schlochauer's book is a must-reader; this reviewer does not hesitate to state quite frankly that in his opinion especially the second part of the impressive volume is a masterwork in clarity of presentation, profundity of knowledge, and beauty of style, rare in legal books. The American reader will be surprized by the manifold and various protections afforded the parties in administrative procedures throughout the Federal Republic.

Schlochauer has succeeded in proving his country a *Rechtsstaat*,—the best compliment we can make a German scholar in the Year IX of the new era.

ROBERT RIE *

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DAIRAINES, S. *Les Étrangers et les Sociétés Étrangères en France. Statut Juridique, Fiscal et Social. Immunités,* Paris: Editions de Villefort, 1957. Pp. 365.

The present volume contains an enormous wealth of information in most condensed form, practically everything that a foreigner or a foreign corporation needs to know about their rights and duties under French law. The various restrictions on immigration will appear liberal if compared to United States immigration practice. Of course, the foreigner immigrating to France is met with a long list of various activities that are reserved more or less exclusively for French nationals. These restrictions are scattered in many laws, ordinances, decrees, etc. The author's effort to collect and condense them in the present volume is all the more useful as pursuant to the Treaty establishing a Common European Market, these restrictions will gradually have to be abolished, at least in favor of the partners to the Treaty. The author's work constitutes therefore a very timely stock-taking. The same applies to the author's analysis of the social security rules applicable to foreigners which are likewise due for unification.

The author gives also basic information concerning the French taxation and currency control system as well as the status of foreigners in court and with respect to public charges. Moreover, the book contains the regulations concerning the entry and sojourn of foreigners in France, their expulsion and extradition, with special regard to the right of asylum and to the status of refugees.

As far as foreign corporations are concerned, we obtain useful information on the determination of the nationality of corporations, the establishment and transfer of their headquarters, on the projects promoted by the Inter-

national Law Association to establish an "International Corporation" without any national allegiance, etc.

As seen from the subtitle the book is also concerned with the status of foreigners enjoying various degrees of immunity—diplomats, consuls, and officials of International Organizations. Finally, the book contains a list of all treaties concluded or adhered to by France having a bearing on the status of foreigners in the wide sense that the author attributes to this term. In an annex it contains the Draft of a new French Code of Private International Law, as well as a useful bibliography.

A special feature of the book which is worth mentioning is the offer of the editors to present all buyers of the book with semestrial supplements free of charge up to January 1, 1959. In view of this fact I venture some suggestions for improving or correcting the contents of the book on some minor matters. As far as the effects of foreign nationalizations are concerned, it is regrettable that the author quotes merely a decision of the *Tribunal de Commerce de la Seine* of February 9, 1956, which is in no way representative of the attitude of French courts in this respect. I agree with the critics of this decision (Mezger in 45 Revue Critique de Droit International Privé (1956) 650) that it affords no solution of the problems involved. True, the nationalization of a Yugoslav corporation by Yugoslavia entails the loss of its legal personality. Such loss should be recognized in France, entailing the loss of the right of the former management to sue on behalf of the corporation. However, this judgment gives no solution to the problem as to what shall become of the assets which this corporation held in France. The words chosen by Dairaines, that "in virtue of the Yugoslav Nationalization Law all assets of the corporation had become the property of the Yugoslav State," would almost tend to support the view that according to Dairaines such assets held in France should have also become the property of the Yugoslav State. Such a view, however, does not even find the support of the judgment quoted by him. According to a long line of French decisions established mainly in respect to Russian corporations after World War I, such foreign nationalizations imply that the ensuing loss of legal personality ought to be recognized in France. However, such corporations survive in France,—but only for the purpose of liquidation, being represented in this respect by a liquidator appointed by a French Court. For detailed information on this subject, as well as on all other matters concerning corporations in French private international law I refer to the standard work by Loussouarn, *Les conflits de lois en matière de sociétés,* Paris, 1949, which has somehow escaped Dairaines' notice, but which should not be omitted from his bibliography.

As far as the author's remarks tend to doubt the practical value of submitting a foreign state to French jurisdiction in matters *jure negotii* (i.e., others than acts of authority), while continuing to grant it immunity *from execution,* even in such cases I venture to say on the strength of my own experience in the Austrian Federal Chancellery that the pressure represented by the menace of such suits will be of considerable influence on the readiness of the state concerned to settle such matters out of court.

As far as the privileges and immunities of international organizations are concerned, headquarters agreements regulate quite a few of the problems

which are not dealt with in the United Nations Agreement on Privileges and Immunities. In view of the fact that the headquarters of a considerable number of international organizations are located in France, the insertion of the outline of such an agreement would have been advisable. Finally, privileges and immunities should be granted to officials of international organizations —irrespective of their nationality. I am aware that especially in the matter of tax exemptions this principle has met with the resistance of some states, especially the United States. According to my knowledge, France does, however, accord the tax exemptions provided for in the Agreement on Privileges and Immunities of OEEC also to French members of the OEEC Staff (*cf.* OEEC Doc (49) 87 quoted by Seidl-Hohenveldern, "Rechtsbeziehungen zwischen Internationalen Organisationen und den einzelnen Staaten," 4 Archiv des Völkerrechts (1953) p. 58).

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Das Argentinische Strafgesetzbuch, translated and with an introduction by Heinz Mattes. Berlin: Walter de Gruyter & Co., 1957, Pp. viii and 110.

Das Bulgarische Strafgesetzbuch vom 2. Februar, 1951, translated by Thea Lyon. Berlin: Walter de Gruyter & Co., 1957. Pp. 63.

The series of translations of the non-German criminal codes (*Sammlung ausserdeutscher Strafgesetzbücher*) has been enriched by the translation of the Argentine (No. 71) and Bulgarian (No. 73) criminal codes, currently in force. The Argentine Code of 1921 is added to the translations covering the Latin-American world (Brazilian and Cuban codes). The Bulgarian translation joins the family of translations of the criminal laws of the Soviet type, including the RSFSR Code of 1926 brought up to date to January 1, 1952, and the Yugoslav, Polish, and Rumanian codes and laws.

The series in which the two translations appear is a remarkable enterprise which, prepared by the Institute for Foreign and International Law of the University of Freiburg, and currently under the general editorship of Professor Jescheck, now represents an almost complete record of the codification efforts in the field of criminal law in modern times. It expands at a rate which successfully keeps up with the prodigious production of criminal laws all over the world.

The translation of the Argentine Code is preceded by an excellent introduction containing, for the benefit of readers not particularly familiar with the law of that country, basic information on the development of criminal law in Argentina presented against the background of a general outline of the organization of the Argentine government, the distribution of powers between the central authorities, and the provincial administrations as regards legislating in the field of criminal law.

The historical part is followed by an analysis of the Code. In Argentina, as in other civil law countries, the Criminal Code constitutes only one, although the most important, of the many penal laws. The Code is the result of complex influences. It is the product of that universalism of legal science established perhaps more firmly among the scholars of criminal law and criminology than in many other branches of law. Argentine legislators,

although profiting from the Spanish legal tradition (Code of 1870) have also drawn on the experience of other lands and cultures. The Scandinavian codes, the drafts of the criminal codes of Germany and Switzerland, but primarily the draft of the Italian Criminal Code prepared in 1921 have left their mark on the Argentine Code. It belongs to that group of criminal codes which, enacted in Europe in the interwar years, was the product of the positivist school of criminal law.

In contrast with the Argentine Code, the Bulgarian Code of 1951 is the result of inspiration derived from the single source of Soviet experience. It is true that it is more humane than the RSFSR Code of 1926. The age limit of criminal responsibility has been set at fourteen years since 1956 (until then it was thirteen years). But, as in the Soviet Code, minors up to eighteen are subject to regular, though somewhat milder, penalties. In the Soviet Union in certain cases criminal law applies all penalties to children of twelve years and over with full severity. The Bulgarian Code also borrowed the institution of analogy, which it abandoned in 1956, from the Soviet model.

However, in spite of all these changes the Bulgarian Criminal Code remains an extremely harsh piece of penal legislation. In the chapter defining crimes against the people's republic only the death penalty is provided for eighteen crimes. The Code also follows Soviet legislative technique very closely. Each group of definitions dealing with a category of crimes is followed by a general clause permitting the imposition of a penalty for any action even remotely connected with a special group of crimes which at a given moment may be considered detrimental to some interests and which the government decides to put under the protection of criminal law.

The Bulgarian Code has a chapter on military crimes as does the Soviet Code, and its definition of and attitude toward preparatory activities are very similar to the Soviet model.

Among its measures of social protection, the general or partial confiscation of property is one of the penalties invariably imposed for major crimes directed against the regime, the political or the social order. The system of penalties in the Bulgarian Code also includes so-called correctional measures with emphasis on labor as the chief means of correction.

KAZIMIERZ GRZYBOWSKI

The Danish Criminal Code. With an introduction by Dr. Knud Waaben. Copenhagen: 1958. G.E.C. Gad Publishers. Pp. 119.

The initiative to translate the Code of 1930 came from the Danish Committee of Comparative Law, which felt it necessary to have an English translation in addition to the French and German translations which have already appeared. The text of the translation is preceded by a thirteen page introduction by Professor Waaben describing the history of the Code, its place in the penal system of Denmark, and its main characteristics.

The Code follows the traditional division of European codes into two parts, a general part which constitutes the center of the entire Danish penal system, and a special part which defines those criminal offenses which are considered to be directed against the most essential interests of society. The special part is supplemented by a number of other laws. The system of

penalties contained in the Code does not include the death penalty, which was introduced for grave crimes (treason and murder) committed under particularly aggravating circumstances by the special Act of 1952.

The Danish Code of 1930 is a very modern piece of legislation, remarkable for the brevity and conciseness of its definitions, the simplicity of its provisions, and the precision of its language. It suffices to compare this Code with the criminal codes of an earlier vintage to see what enormous progress was made during the interwar years in the legislative techniques in the field of criminal law. The Danish Code is quite similar in this respect to other codes of the same period, although even among these it is outstanding as an example of clarity and precision. Now that the art of writing laws has sadly declined even in countries where it reached high standards in the past, while a number of new countries in Asia and Africa are laying the foundations for their legal order, the project of translation should be acclaimed, and the results deserve praise.

However, interest in the Danish Code of 1930 is not limited to the excellence of its techniques. It represents twenty-five years of application, and, as Professor Waaben assures us, it has withstood the test of time in its main outline and there is no need for a major revision of its provisions.

This fact is of great importance, as the Code was the result of a tendency to incorporate in the criminal law of Denmark all the newest devices designed by the modern criminologists of Europe.[1] In this respect the Danish Code went further than most of the criminal legislation of the same vintage adopted in other countries. A particular feature of the Code was the so-called analogy clause (Article 1) stating that "Only acts punishable under a statute or acts of entirely similar nature shall be punished. . . ."[2]

The meaning of the analogy clause is twofold. In the first place, it constitutes the abolition of the principle *"nulla poena sine lege"* (prohibition of ex post facto laws) which is considered one of the cornerstones of the modern *Rechtsstaat*. In the second place, it was predicated on the possibility, contrary to European tradition, of the evolution of penal law through judicial legislation.[3]

When the Danish Code of 1930 was enacted, only the Criminal Code of the RSFSR contained a similar provision. In Russia the analogy clause was needed to enable Soviet criminal law to meet any emergency in the quickly changing conditions in which the new policies called for the support of the criminal courts. In Germany the Law of June 28, 1935, amended Section 2 of the Criminal Code and made punishable all acts deserving of "penalty according to the people's sound sentiment. If no particular criminal statute may be directly applied to the act, the act shall be punished under that statute the basic principle of which best fits the act."

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[1] Reform of criminal law in Denmark included among others the Sterilization Law of 1929, which became a model for similar legislation in the Baltic Sea area. *Cf.* Lucas, Monatsschrift für Kriminologie und Strafrechtsreform (1930) 641 ff.

[2] See Krabbe, O. H. Bergerlig Straffelov of April 15, 1930 (1935 ed.) pp. 28–29. Dr. Hellmuth von Weber, "Zur Geschichte der Analogie im Strafrecht," 56 Zeitschrift für die gesamte Strafrechtswissenschaft (1936–37) 653 ff.

[3] Roscoe Pound, "Individualization of Justice," 7 Fordham Law Review (1938) 153 ff. Jerome Hall, *"Nulla poena sine lege,"* 47 The Yale Law Journal (1937) 165 ff.

The fact that Denmark adopted an institution which did not appear in the criminal codes of any other country (Italy, Poland, and Yugoslavia) was somewhat perplexing, and could not be explained simply by a reference to the political regime of the country. It was felt that there must be more general reasons which impelled Denmark to seek to relax the principle of strict judicial loyalty to the statute. It was thought that the analogy clause represents the other aspect of the ultimate purpose of the administration of justice, which has other duties in addition to the strict enforcement of laws, an aspect that, according to Dean Pound, could be carried out by the court in what he called an "administrative process" as distinguished from a "judicial process."[4]

But, as so often happens, the too sanguine hopes of legislators and theoreticians were not realized. In all three countries where the analogy clause was introduced, it proved a failure. In Russia the analogy clause came under attack in the late thirties, and in the projects of criminal law which were discussed in connection with, and after, the enactment of the 1936 Constitution, a considerable number of Soviet scholars took the stand that it was incompatible with a firm legal order and the rule of law. It also appeared that the practical importance of analogy in disposing of criminal cases was not great. It contributed but little to the development of Soviet law. Soviet courts found in it an easy tool with which to decide cases without a proper study of all the circumstances which would classify them under the already existing provisions of the law. Soviet courts—as the president of the Soviet Supreme Court observed—made frequent use of the analogy clause, but their practice had very little to do with the correct application of the law, and he felt that it led to replacing the law with arbitrariness.[5]

In Germany, the Reichsgericht and a number of important jurists also were opposed to a too extensive application of analogy. It played, in fact, but an insignificant role in the Nazi legal regime.[6]

Professor Waaben passes over the question of the analogy clause in silence. He states emphatically that "*nulla poena sine lege* is laid down as a fundamental principle of Danish law." The reviewer must express his regret that this opportunity to enlighten the public on this important subject was missed, but he interprets Professor Waaben's silence as meaning that analogy, which did not prosper in more congenial surroundings, could not play a major role in a country which was under no compelling reason to abandon the rule of law.

This is one of the occasions when a jurist is confronted with a rather melancholy situation, in which theoretical jurisprudence has nothing to

[4] *Cf.* Pound, *op. cit.* Also K. Grzybowski, "From Contract to Status," Seminar (1953) 62–63.

[5] Juril Starosolskyj, "The Principle of Analogy in Criminal Law: An Aspect of Soviet Legal Thinking." Research Program on the USSR (New York Mimeographed Series 1954), pp. 48–53, 62–63. *Cf.* also D. S. Karev, "The Forthcoming Reform in USSR Criminal Law," 26 Harvard Law Record, May 1, 1958.

The reform of Soviet criminal law has been debated now for some twenty years, and there is very little to show for the labors of Soviet scholars engaged in it. However, the very persistence of their attacks on the analogy clause, though the regime may consider it a useful tool in the enforcement of its policies, seems to indicate that this institution has contributed little to the strengthening of the legal order in the Soviet Union.

[6] Gsovski, V. The Statutory Criminal Law of Germany, Washington, 1947, p. 5.

show for its learned constructions, as life chooses an altogether different channel to follow.

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McWHINNEY, EDWARD. *Judicial Review in the English Speaking World.* University of Toronto Press. 1956. Pp. xiv, 201.

Applying the comparative method to the constitutions of the Commonwealth and the United States, the author—avowedly influenced by the Legal Realists, the American Sociological School, and also the new "policy" group—probes into the factors that have made judicial review in the commonwealth countries rather different from that in the United States. Dean Wright in his Foreword has already pointed to some points open to argument, such as the author's advocacy of "dynamic participation in policy-making by the courts," and his assumption that "in the realms of private law such as property and equity there is . . . an absence of a dynamic or creative role" (x).

The author is well aware of the somewhat problematic character of his topic: "Since none of the constitutions of the Commonwealth contains express provision for direct judicial review, the carry-over of the practice . . . would seem due to the fact that . . . its historical roots and justification have been forgotten . . ."(14). Indeed, the Privy Council itself has been baffled at times as to the exact nature of the function it has been performing, the Lord Chancellor (Halsbury) expressing doubts "as to whether there could be such a thing as an 'unconstitutional act' of a Dominion or colonial legislature, once assented to by the Crown" (14). Thus the distinction well made by the author as between "the position of a supreme court exercising direct judicial review under a written and rigid constitution" and "that of the House of Lords in the United Kingdom, sitting as the highest tribunal" (15) would seem merely to be duplicated by the difference between judicial review as known in the United States and in the Commonwealth.

The author brings out clearly that the Judicial Committee of the Privy Council merely advise the Crown (52) and "is not strictly a court of law" (54). While it "exercised the power of judicial review on the premise that the colonial legislatures were subordinate legislative bodies" (58), now the Canadian and Australian Courts continue to exercise it, though neither constitution makes any mention of it. This is because, being "both patterned to a considerable extent on the Constitution of the United States, . . . there would clearly be a strong temptation for appellate judges . . . unconsciously to adopt the American practice of judicial review without adverting to its rather different historical origin" (59).

The real merit of the book is in the information it offers as to the trends of judicial review in the Commonwealth countries. This is summed up in the statement that "the record in regard to the Constitution of the Union of South Africa, the Constitution of Ireland since 1937, and even the new Constitution of the Republic of India in the few years since it came into force, suggests that judicial interpretation will continue to be the most significant

factor in constitutional growth and decay in the various Commonwealth countries outside the United Kingdom" (13).

By way of an overall appraisal, the author points out that "the most striking judicial action in protection of political, social, and economic rights has occurred in the Union of South Africa" (20) where the courts "have been able to check and delay the more overt features of Prime Minister Malan's *apartheid* programme quite as effectively through simple statutory interpretation as they have by direct judicial review in those areas of the Constitution (the "entrenched clauses") where alone they have been able to assert this power" (19). In comparison, "the actual record of judicial utilization of the Bill of Rights in the Irish Constitution of 1937 has . . . been rather narrow in the light of the comprehensiveness of the written provisions of that Constitution" (20), while the South African Constitution protects, through the "entrenched clauses," voting rights in Cape province only. All this goes to show that neither the existence of direct judicial review, nor the texts, the actual words of a constitutional instrument, are decisive in the author's view. He brings out forcefully that "the protection of civil liberties as an end result—actually claims of free speech and association—was in fact reached by the High Court of Australia in the *Communist Party Case* through harsh construction of the national government's legislative power over defence." (20). Similarly, "individual members of the Supreme Court of Canada, in spite of the absence of a formal bill of rights in the constitutional instrument, have before this gone on record in support of a 'right of free public discussion in public affairs'; while Mr. Justice Rand of the present bench of that Court seems to be bending his energies towards the judicial creation of certain 'inherent rights of the Canadian citizen' " (21).

And while both Bill of Rights and the institution of judicial review are provided for in India, it is a sobering statement that "the new Indian Supreme Court, in actually exercising judicial review, has tended to cut down and confine the broad sweep of the various provisions and guarantees of the new Constitution." (149).

No doubt judicial review as written in books may be different from what it is in action. No wonder the author tries to find its animating spirit where it operates free from the dead weight of colonial tradition: in United States practice. After a penetrating analysis of the various trends, he objects to Frankfurter and the "passivists" the vagueness of their tests so loosely worded "as to allow almost any content to be poured into them" (183), while to the "judicial activists" he objects a sort of "label thinking" (184). The new trend is exemplified by the recent *Steel Case* which showed "both the activists and the passivists on the Court united against the conception of a strong executive and throwing the weight of the Court toward a strong legislature, as the end of the cycle of the last generation—from strong Court to strong President to strong Congress" (185). And he concludes that "the strikingly novel agreement that the judges have shown in the recent public school segregation decision . . . at least suggests that the polar extremes of doctrinal attitudes among the various judges that characterized the Stone and the Vinson Courts will be maintained much less dogmatically in the future" (185).

Throughout the book, the author strongly criticizes legal positivism. By this he understands that the Australian High Court, for instance, while professing "strict and complete legalism," falls into "what Holmes has called a typical natural law manifestation—the lawyer's unawareness that he is taking sides on burning questions" (95). But what if the legalist *has* that awareness? Thus, "the decisions of the Canadian Supreme Court, and especially of Sir Lyman Duff, its Chief Justice during the time of the crucial decisions of the 1930's, result as much from personal choice as from the dictates of *stare decisis*." (27). In Australia, "the rejection by the courts . . . of the Labour Government's legislation nationalizing private trading banks was followed by the defeat of the Labour Government at an election fought primarily on the issue of nationalization" (26). Or is it likely that in the *Communist Party Case* "the judges, because of their rigorously positivist approach, did not seem to be aware that a conflict between the interest in free speech and a countervailing interest in national security (especially dominant during the Cold War crisis) was what was involved" (24)?

Again, the author admits: "one might tend too easily to exaggerate the extent to which the courts have stood in the way of popular opinion" (26). Thus, in Canada "the Privy Council's work is not entirely deserving of censure. The period . . . favoring a broad interpretation of Dominion powers even at the expense of the provinces, coincides . . . with the era . . . when the settlers advanced ever westwards and into the north . . . when a strong centralized administration could aid and foster this expansion. The period . . . when . . . Watson and . . . Haldane . . . restricted Dominion powers in favor of provincial rights, was the period of the substantial political dominance of the Liberal party . . . which depended on the French . . . Thus, the provincial rights plea may frequently spring in Canada from deeply rooted claims for the treatment at the local level" (70).

The author sets high the influence of common legal education and training, and a common system of professional organization throughout the Commonwealth countries. On its negative side, he still deplores "uniformly positivist judicial attitudes to constitutional adjudication" (27). Yet on its affirmative side he exalts that system as "a prime contributor to that distinct bias towards civil liberties" and concludes: "whatever the formal theory, English legal positivism . . . has always meant something more, in action, than strict and literal interpretation" (29).

It must be so, indeed, if the author is able to extract "fundamental principles to which judges should look in the decision of constitutional cases" from Goodhart's four major principles of English "moral law" and Denning's three main 'instincts,' adding to them a postulate of political democracy. Quoting Jerome Hall, he says "these freedoms may thus be said to exist in effect in the Commonwealth countries as 'living law' postulates of democratic government, guiding the decision-maker . . . in exercising a policy choice." (25).

It must also be said that it is a rather sketchy characterization of the "new policy approach" to say that a case not only should be identified with a "value," but that "countervailing values" should also be considered, and not only goals but different means to achieve them should be taken into account.

All this goes to show that the author's appeal is not so much from legal positivism to natural law doctrine in the sense of the old *dictamen rectae rationis,* but— from the text, the letter of enacted, written law to the spirit that animates the "living law" in the English Speaking World. There is wisdom in this reversion to what may be called "entrenched natural law." There is also wisdom in a ruling that can be defended both on the basis of "strict and complete legalism" and of a freewheeling "policy approach." Whether the author's approach yields reliable principles beyond the very old tradition of veiling one with the other—a tradition in which a good deal of ingenuity and wisdom has been displayed from the Roman Praetors to the English Law Lords and the Justices of the Supreme Court of the United States—is doubtful. One may indeed doubt whether unveiled parts of a complex situation, such as this, show a truer shape of the whole than if they are left veiled. "An avowed exercise of a policy-making power with no criterion of values other than an individual judge's own preferences and philosophies may be as dangerous as a policy-making function which is obscured by the 'judicial positivism' which the author attacks" (x). Dean Wright points here to a fault which cannot be belittled by those who keep in mind the ravages of judicial arbitrariness in modern totalitarianism.

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WYNES, W. ANSTEY. *Legislative, Executive and Judicial Powers in Australia.* 2nd edition. Sydney/Melbourne/Brisbane: The Law Book Co. of Australasia Pty. Ltd., 1956. Pp. lxiv, 768.

SAWER, GEOFFREY. *Cases on the Constitution of the Commonwealth of Australia.* 2nd edition. Sydney/Melbourne/Brisbane: The Law Book Co. of Australasia Pty. Ltd., 1957. Pp. xxxi, 629.

"It is not sufficiently recognized that the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure. Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."

These remarks, uttered by the present Chief Justice of Australia, Sir Owen Dixon, on the occasion of his assuming that office in 1952, are quoted on the title page of Dr. Wynes' volume, which might, really, more accurately have been entitled "the Constitution of Australia as judicially interpreted." The Chief Justice's remarks are the key to understanding of Dr. Wynes' own interpretation of the court's record of interpretation, reflecting as they do the dominant official philosophy of Australian judges, practitioners, and many of the law professors at the present day—English legal positivism. Although the Privy Council was once moved to suggest—and in an Australian case (the Bank Nationalisation decision) at that—that in constitutional cases, the

problem at bar might be not so much "legal" as "political, social, and economic" (79 C.L.R. 497, 639 (1949)) the Australian High Court continues to insist that questions of constitutionality of legislation can be judicially determined solely upon a "dictionary" approach to the words of the constitutional text, untainted by any consideration of the background socio-economic facts to the legislation in question. The Australian High Court's judgments, apart from their being easily the most prolix of any of the English-speaking countries—the judicial opinions alone, in the Bank Nationalisation case, run to 252 pages in the official law reports—are in fact models of conceptualist, "black-letter law," reasoning and are devoid altogether of reference to the type of policy argument to which the United States Supreme Court has become accustomed in recent years.

One or two Australian jurists have seen fit to dissent from this orthodox view of the proper role and responsibilities of the constitutional judge, pointing to the frequent and very marked gap between what the Australian High Court says it is doing in a particular case (the official opinions filed in that case) and what it has actually done in that case (the end-result of the particular decision, when applied). Indeed, it may be suggested, on the basis of the very convincing researches of scholars like Julius Stone and Geoffrey Sawer that the Australian High Court's decisions stem as frequently from "inarticulate major premises"—concealed judicial value-preferences—as Mr. Justice Holmes implied, in his famous dissent in the Lochner case, was the case with the conservative majority on the United States Supreme Court.

Granted its own particular premise that an essentially positivistic analysis is the only one proper to the jurist considering and appraising court decisions, Dr. Wynes' book is an outstanding piece of legal scholarship. It is thoroughly and painstakingly documented in terms of case-law decisions and also periodical and treatise references; and it is tightly-reasoned and organized throughout. The author is an Australian jurist of long standing, with a particularly rich and varied background of experience in the federal civil service and in academic institutions in Australia.

Professor Sawer's casebook is intended generally as a companion work to existing text-books in the field, and this means, above all, to Wynes. It may strike the American reader that Professor Sawer has been unusually modest in his own contributions to the casebook, and that the whole work would have gained immensely in interest and intrinsic worth if he had interpolated some more of his own personal appraisals and comments on the work of the Australian High Court. But the law casebook is still a rather rare teaching tool in Australia—strictly a postwar phenomenon, and only a handful have been published at that—and publishers do not take too kindly as yet to an editor's intruding too much of his own views, no matter how distinguishing he may be. The omission is the greater pity in Professor Sawer's case because he does not agree with Dr. Wyne's emphasis, in analysis, on positivism to the exclusion of all else: Professor Sawer is, in fact, a major critic of the Australian High Court's dominant "legalistic" philosophy of interpretation of the present day. Readers of these two works together—Wynes and Sawer —might be led to conclude, without more, that Australian constitutional jurisprudence is Ihering's heaven of juristic concepts, another "exercise in

logic and not in life." The solution, clearly, is for Professor Sawer to produce a monograph on the Australian Constitution that can take into account some of the main truths of the American Realist and Sociological schools of law, with which (as I interpret his view as published elsewhere), he is to a large extent in sympathy.

EDWARD MCWHINNEY

HAINES, C. G. and SHERWOOD, F. H. *The Role of the Supreme Court in American Government and Politics 1835–1864.* Berkeley and Los Angeles: University of California Press, 1957. Pp. x, 533.

The senior author of this work, Charles Grove Haines, well known for his classic studies of *The American Doctrine of Judicial Review* and also *The Revival of Natural Law Concepts,* planned the present work as a successor volume to an earlier study of the Supreme Court over the period 1789–1835. Where Professor Haines' earlier volume was concerned, so to speak, with John Marshall's court and the successful establishment of the doctrine of judicial review as part of the Federalist programme to strengthen the central government and to secure the protection of property interests, the present volume covers the span, as Chief Justice, of Marshall's successor, Roger Taney. It was intended, originally, to cover the period 1835–1885, but these plans had to be curtailed somewhat with Professor Haines' death a decade ago, and the end of the Taney Chief Justiceship in 1864 seemed in many ways to be a convenient breaking-off point as marking the end of an era of Democratic control of the court and the ushering in of the new "Reconstruction" court on which President Lincoln's "country lawyers" had a working majority.

Since Taney was an active politician and associate of President Andrew Jackson at the time of his appointment as Chief Justice, it might have been expected that he and the other Jackson appointees to the court would reverse Chief Justice Marshall's special bias, in constitutional interpretation, of broad construction of the powers of the national government and its instrumentalities, in favor of Jeffersonian-type ideas of territorial decentralization of power and the furthering of states-rights claims. In fact, it is the considered conclusion of Messrs. Haines and Sherwood, after their study, that, contrary to general belief, the Taney Court's decisions over its whole thirty-year span fail to support any such Jeffersonian weighting to the construction of the constitution: in the Taney court's decisions concerning the separation of powers, the relations between nation and states, and the protection of vested property interests, the authors discover, in fact, a clear consolidation of the federal judicial power and the furtherance and improvement of its operation.

Foreign students of American constitutional law will find especial interest in the two chapters concerning the American Civil War and the relations between the judges and President Abraham Lincoln during that period, for the American Supreme Court decisions of that period are the recognized source materials at the present day for concepts of constitutional Emergency Powers and the proper limits of any constitutional doctrine of "Necessity," in all of the main English-speaking countries. Of equal interest is the discussion of the slavery issue, and especially the famous Dred Scott decision which

many historians consider to have hastened the onset of the Civil War. Looking back now on this great political-legal *cause célébre* of a century ago, students of the controversies and philosophic disputes on the contemporary court may, indeed, with advantage, consider to what extent the (in present-day terminology) civil libertarian "activist" position in effect maintained by the dissenters in the Dred Scott case might have prevented this great "self-inflicted wound," as Chief Justice Hughes once described the decision; alternatively, would the wiser course of judicial statesmanship have been for the majority judges to have embraced the obvious opportunities for a Frankfurterian-type self-restraint and thus avoided a major substantive law ruling, in view of the clear political undertones to the case? In pondering over this question, the reader might also note, in the present era of hyper-critical (and much criticized) dissenting opinions, that the Taney chief justiceship marked the real beginning of the settled habit of filing separate judicial opinions—whether special concurrences or dissents; for Taney, in spite of his many talents, did not dominate his colleagues as much as Marshall had done, and he had the extra disadvantage (are there any parallels here to the present-day court?) of having on his court at least one judge (McLean) who harbored presidential ambitions and therefore tended to write his judicial opinions with an eye on the editorial pages in the popular press rather than in answer to the legal issues raised by the individual litigants before the court.

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Book Notices

MAILLET, J. *Histoire des institutions et des faits sociaux*. Petits Précis Dalloz. Paris: Librairie Dalloz, 1956. Pp. 649.

Under the old curriculum of 1922, Roman law was taught in French law schools on parallel lines with *droit civil* courses. The Law of Persons, Real and Personal Property were taught in the first year, Obligations and Contracts in the second year; the courses in these subjects were given in French private law and Roman law as well. The reform of 1954 has taken a broader approach to the study of ancient legal systems during the first two years of the law school curriculum, and courses on the general structure of the societies of the past have been substituted for those on Roman private law. Roman law has been moved up to the third and fourth years for those students who want to specialize in private law, while in the first year, the course in Roman law has been replaced by a course on the History of Institutions covering the study of Mediterranean Antiquity.

Professor Maillet's *Précis* corresponds to the curriculum of the first year. It comprises an Introduction (I: The Ancient Orient; II: The Mediterranean Antiquity; III. Elimination of the Ancient World (V–Xth centuries A.D.) and three Books, 1. The Ancient City: The Greek City, The Roman City; 2. The Roman Empire: The High-Empire, The Low-Empire; 3. The Franc World.

As their titles indicate, two important portions of the *Précis* deal with several subjects of Roman private law: sources, persons, procedure, etc., (but does not include the law of things or obligations). The general idea of the work is that society constitutes a unity the different parts of which, political organization, economic system, legal institutions, etc., are closely linked together. The above-mentioned subjects of private law were consequently included as part of a more complete description of Roman society and not as a law-subject as such.

The work being reviewed has the commendable qualities which made the reputation of many "little" Dalloz volumes: precision and clarity of style, and a great amount of information contained in pocketbook size. Hence, Professor Maillet's *Précis* is a valuable reference book and a useful tool for the student who has already been exposed to a less concentrated outline of the subject matter during the lectures offered in the classroom. To the general reader, however, the *Précis*-format appears as a kind of Procrustes' bed, inadequate to bring back to life the societies of Mediterranean antiquity, at ease in more airy volumes, where their story can develop and breathe more freely.

G. M. RAZI

SUTHERLAND, A. E. (ed.) *Government under Law*. A Conference held at Harvard Law School on the Occasion of the Bicentennial of John Marshall. Cambridge: Harvard University Press, 1956. Pp. xi, 587.

When in the first days of September 1957, the International Association of Comparative Law had arranged a colloquium on the "Rule of Law As Understood in the West," opportunity was given to learn about the fundamental thoughts of the American constitutional and legal system, as well as about the difference which exists between the American and the socialist systems, especially as represented by Dr. Rozmaryn (Warsaw). What is decisive is not the formal legal order ruling over the society and the individuals but the fundamental principles which are at

the bottom of the constitution and the statutes. For these fundamental principles of the constitutional and legal system of the United States we have an excellent basis of learning in this book which contains a full report on the papers, addresses, and discussions of a conference held at Harvard Law School on the occasion of the bicentennial of John Marshall in September 1955. Judge Wyzanski (p. 494) states that law is a resolution of differences under a great tradition, reminding us of the ancient Greeks—and we must add the Romans—the struggles of the church for recognition, the philosophy of the Middle Ages, the struggle to turn immunity and license into liberty.

All constitutions are the result of historical evolutions as we may clearly recognize by the reports of André Tunc, "Government under Law: a Civilian View" and "The Royal Will and the Rule of Law (a survey of French constitutionalism under the Ancien régime)," R. Evershed "Government under Law in Post-War England," Dixon, "Marshall and the Australian Constitution," A. van de S. Centlivres, "The Constitution of the Union of South Africa and the Rule of Law," and P. Kerwin, "Constitutionalism in Canada."

Of special interest are the reports concerning the Constitution of the United States. First, we have an excellent address by F. Frankfurter, "John Marshall and the Judicial Function." Here we can see the great importance of the judiciary, especially that of the United States Supreme Court in the evolution of the Constitution. The importance of the judiciary is the greater as the Constitution contains many "Delphic provisions" or "chameleon words" and it is nearly inevitable to remember the famous words of Justice Hughes "The Constitution is what the judges say it is." But I think this is not only of value for constitutional law but for all written law. It was the judiciary, above all the Supreme Court, which adapted the Constitution to the requirements of the "watch-dog government" and then of the modern welfare state.

One of the most Delphic provisions of the Constitution is the well-known due process clause, and two of the conference papers deal with it: H. Hastie examines the "Judicial Method in Due Process Inquiry" and McG. Bundy gives a very interesting report under the heading "Lay View of Due Process." We can fully agree with Bundy when he says that "due process is unthinkable without able judges and zealous lawyers" (p. 382), as well as with Hastie's statement that it is inevitable to utilize many materials from outside the formal legal field (p. 347). In this connection the report of J. M. Snee, S. J., "Leviathan at the Bar of Justice," is of great interest as he deals with natural law.

It is obvious that the principles of the Constitution, especially the separation of powers, cannot be fully adhered to in times of crisis, and therefore we may read with particular attention the reports of F. Shackelford, "The Separation of Powers in Time of Crisis," and of Ch. Fairman, "Government under Law in Time of Crisis," referring to the case of an explosion of a hydrogen bomb in the area of the United States.

All reports and addresses are followed by discussions in which many details and aspects of the above-mentioned problems are more closely examined. The great volume may be recommended to everyone who is interested in the problems of the state and the constitution.

HANS SPANNER

DIAMOND, W., *Development Banks*. Baltimore: The John Hopkins Press (Publication of the Economic Development Institute), 1957. Pp. xiii, 128.

It is a rare occurrence in the middle of the twentieth century that a "first" monograph be published on a subject of great importance; William Dia-

mond's excellent book on development banks has this distinction. Yet development banks are not a novelty. The Société Générale pour Favoriser l'Industrie Nationale was formed in Brussels back in 1822, and the Crédit Mobilier and the Crédit Foncier in Paris in 1852. Since that time numerous development banks and development corporations have been created both in advanced, and in less advanced countries, particularly during the last 25 years. These institutions did not go unnoticed, of course, in scientific literature, but it took the initiative of the Economic Development Institute, to which the author is attached, to produce this monograph on the subject. (The Economic Development Institute was established by the International Bank for Reconstruction and Development to train experts already working in responsible positions with the governments or institutions of the World Bank's member countries. The book under review is the first publication of the Institute.)

Development banks, although they differ widely in operation and form, have as a common goal the promotion of industrialization and economic expansion of a country. The conceptual distinction between a development bank and finance corporation on the one hand (which is supposed to provide *loan* capital), and a development corporation on the other (which is concerned primarily with *equity* capital), is not a practical distinction, the author points out, because "in the area between outright debt and common shares lies a broad range of useful investment possibilities" and the difference is actually quite blurred. Some development banks are practically but arms of the government which has set them up; as the term is used in this monograph; however, "a development bank . . . is a financial institution devoted primarily to stimulating the private sector of the economy. . . . [M]ost development banks have been set up as catalysts for investment in the private sector, to provide injections of capital, enterprise and management, not as administrative devices to handle the government's own investments"(4).

After a brief introduction on the process of investment, the author reviews the experience of some advanced countries. The "meat" of the book is the discussion of the formation and operation of a development bank; the author deals with the alternative whether a new institution should be created or not; he describes the scope and nature of its activities, its finances, its relationship with the government and with the enterprises it finances, its personnel requirements, and its profitability. The book contains a selected list of development banks and a summary description of the following important institutions: The Industrial Development Bank of Turkey; three development banks of India (The Industrial Finance Corporation, The National Industrial Development Corporation, and The Industrial Credit and Investment Corporation of India); and, finally, The Nacional Financiera of Mexico.

The monograph fills an important gap.

JOSEPH DACH

MEYER, G. *Charles Dumoulin—Ein führender französischer Rechtsgelehrter*. Nürnberg: Andreas Abraham, 1956. Pp. 74.

This small volume represents the doctoral thesis of its author who died as a German officer on the Russian battlefield fifteen years ago. In honor of his memory the dissertation, originally marked *summa cum laude,* has been published by his former teacher at the University of Würzburg, Ernst Wolgast, as volume 4 of the series *Rechts- und sozialwissenschaftliche Vorträge und Schriften* sponsored by the *Hochschule* Nürnberg.

Dr. Meyer divided his thesis into

four main chapters: the first is strictly biographical, and deals with Dumoulin's philosophical, religious, and political opinions outside his legal endeavors; chapter II shows Dumoulin, the attorney at the Châtelet, the convert to Calvinism, the émigré who had found refuge at Tübingen, the apostate from Calvinism and advocate of the Gallican Catholic church, a follower of Bartolus, a humanist and ardent defender of the royal powers against papal supremacy, yet the jealous theoretician of the French king's equality with the Roman-German emperor. The *maistre* regards the pope as the highest priest of the Catholic church, but essentially beneath the emperor in Rome or Germany, and beneath the king in France. As far as French public law is concerned, Dumoulin appears as a predecessor of Bodin (*En France la monarchie est royale et non seigneuriale*) and therefore looks toward the king as the sovereign, but not as the proprietor of his realm. Thus the royal power is restricted by the (a) estates, (b) the nobility, (c) the parliament, i.e. the high court of judicature. In Dumoulin's writings the ancient ideal of the "mixed constitution"—a mixture of monarchical, aristocratic, and democratic elements —finds renewed expression after it had been developed originally by Aristotle's disciple, Dicaearchos, by Polybius, and by the Roman Scipio Africanus. It is interesting to note that this French moderate royalist, as we may call Dumoulin-Molinaeus, the younger contemporary of Martin Luther, always expressed special admiration for the Swiss and their ability to confirm and preserve their various legal liberties.

In chapter III the author presents Dumoulin as the planner of the unification and codification of French civil, common law, thereby as Napoleon's predecessor. As a criminal lawyer Dumoulin tried, one quarter of a millenium before the Revolution, to interpret articles, unfavorable to a defendant, in a restrictive sense, i.e., *pro reo*.

Chapter IV finally explains Dumoulin's treatment of economic theories, especially his position toward the problems of interest and rent. The author clarifies Dumoulin's views at great extent, but it may suffice here to state that Dumoulin proposed limitations to be determined by law as to the height of the rate of interest and rent. Of special interest to the modern reader might be the great *maistre's* theory that the quality of a currency must not be undermined lest international law be violated (p. 68). Because of international trade the currency of one partner nation has or may become legal or contractual tender with the other partner nation.

The booklet was written when its author had been a member of the *Wehrmacht* and as such stayed in France where he found the necessary assistance in the libraries of Paris and Dijon. Only very rarely can traces of the evil era during which the author wrote the scholarly and objective presentation of his topic, be noted. While it may be quite true that French legalistic liberalists have interpreted their own theories into Dumoulin's works, it is improbable that there will come about a social reform in accordance with the Ancien Régime: Meyer assumes such a *Suche* as an aim of French social and legal science *von heute* (p. 56), but this *heute* is the era of Vichy, gone and gladly-ungladly forgotten by the French. That the great Austrian economist Böhm-Bawerk's *magnum opus* on the History of Capital Interests should be quoted in the bibliography under the heading *Französische Literatur* was regarded as insult added upon injury by your reviewer, himself a former refugee from *Wehrmacht*-occupied Austria.

However, these are minor shortcomings. The book is recommended to anyone interested in law and his-

tory, and every reader will mourn the young writer's untimely death, brought about by history's most cruel and—let us hope—last war.

ROBERT RIE

HAAS, E. B.—WHITING, A. S. *Dynamics of International Relations*. New York: McGraw-Hill Book Company, Inc., 1956. Pp. xx, 557.

International relations study has traditionally been concerned, on the one hand, with man's quest for morality, stability, and community, and on the other hand, with power, machination, and domination. A different methodology purports to be attempted in this text, one which assumes that the ends of foreign policy are qualitatively similar to ends implicit in any other field of politics, and consequently subject to the same laws, and, in turn, analytical techniques. What emerges is a compendium of the ways in which shapers and conditioners of policy view their mutual interrelations, in terms of their native ideological and institutional frameworks. The works of Max Weber, Karl Mannheim, Harold Lasswell, and Robert MacIver account in large part for the eclectic end-result.

In six parts and twenty-two chapters the following general subjects are treated: National Communities and International Society, Factors of Power, Policy Implementation and the Means of International Relations, Foreign Policy and Political Institutions, International Law, and The Rise of International Organization. The facts of international interdependence and their denial in the form of anticipated violence that breeds continued acceptance of national values are established introductorily, after which attention is directed to the problem of conflicts of interest in international society and the policy aims that must be defined in order that desired ends may be achieved through available means. The factors of power which condition the definition of aims are then examined, followed by a study of the means of international relations in the form of diplomacy, alliances, propaganda and subversion, trade and commercial practices, and foreign aid and foreign policy. Case studies are then undertaken with four representative type political entities considered: The United States, a pluralistic democracy; Soviet Russia, a single group authoritarian elite; Egypt, an oligarchical elite; and Nazi Germany, characterized at first by multiple elites, and later by a single authoritarian elite. In each of these case studies, the foreign relations of the respective countries is examined in light of their governmental structure and ideology.

The last two parts of the text deal respectively with international law and world organization, both stemming from the desire for stability and order, although such aims are rarely the dominant purpose of those who invoke legal techniques and arguments. International law is held to remain a function of political relations among nations and not a restraining force against them. The varieties and roles of international organization and the concept of collective security through the United Nations are then discussed, from which an ever-increasing trend toward regionalism is then noted and described. While regional ties are more diverse, more penetrating, and more appreciated by ruling groups than at any other time, the conflict between systems is apparent. The very totality of modern hydrogen war may be the chief deterrent to full hostilities, without ruling out localized conflicts fought with conventional weapons.

HILLIARD A. GARDINER

Current Literature

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LIST OF RECENT BOOKS AND ARTICLES IN ENGLISH ON FOREIGN AND COMPARATIVE LAW *

I. ON COMPARATIVE LAW AND RELATED SUBJECTS IN GENERAL

1. COMPARATIVE LAW IN GENERAL

Books:

von Mehren, A. T.: The civil law system; cases and materials for the comparative study of law. Englewood Cliffs, 1957. 922 p. An important collection of French and German cases and materials especially in the field of French public law, and on French and German delictual and contractual obligations. The appendix contains translations from the French Civil Code (esp. articles 1101–1369) and from the German Civil Code (Book I. Gen. Principles arts. 116–157; Book II. Law of Obligations arts. 241–397, 516–534 and 581–597).

Articles:

Duff, P. W.: Herbert Felix Jolowicz. Butterworths S. Afr. L. Rev. 1956: 1–2.

Journal of African Law. London. 1 vol. 1956.

Katz, Milton: International legal studies: A new vista for the legal profession. ABAJ **42:** 53–56, 91–92, '56.

McWhinney, Edward: Comparative law and jurisprudence at the University of Toronto. J. Legal Educ. **9:** 99–103, '56.

Northrop, F. S. C.: A common lawyer looks at the civil law by F. H. Lawson. (Book review.) Mich. L. Rev. **54:** 1029–39, '56.

Rheinstein, Max: In memory of Ernst Rabel. Am. J. Comp. L. **5:** 185–96, '56.

Seasongood, Murray: Elemér Balogh: In Memoriam. Tulane L. Rev. **30:** 315–18, '56.

Stone, Ferdinand: Ernst Rabel: In Memoriam. Tulane L. Rev. **30:** 320–21, '56.

Warren, Earl: Revival of comparative jurisprudence. Am. J. Comp. L. **5:**1, '56.

Yntema, H. E.: Comparative legal research. Some remarks on "Looking out of the cave." Mich. L. Rev. **54:** 899–928, '56.

2. ACADEMIES, CONGRESSES AND INSTITUTES

Books:

Inter-American Bar Association: 9th Conference Proceedings. Dallas, 1956. 304 p.

* This list contains books up to and including 1957 and articles published between January 1, 1956 and December 31, 1956, and may be considered as the third interim supplement to A BIBLIOGRAPHY OF FOREIGN AND COMPARATIVE LAW, compiled and annotated by Charles Szladits, Parker School of Foreign and Comparative Law, Columbia University. Distributed by Oceana Publications, New York, 1955. xx + 508 pp.

International American Conference, Inter-American convention on the granting of political rights to women. Washington, 1956. 11 p.

United Nations. Tech. Assistance Administration. Institute of Public Administration in Turkey. New York, 1954. 55 p. (ST/TAA/M.6; 1./4136/UNESCO)

Articles:

Ahmed, L. N.: The role of the United Nations Administrative Committee on Co-ordination in the co-ordination of programmes and activities of the United Nations and the Specialised Agencies. Rev. Int'l des Sci. Administratives 22. No. **3**: 95–117, '56.

The Baltic Conference. An abridged history. The Scandinavian Shipping Gaz. **39**: 549–605, '55.

Brandon, Michael: Fifth conference of the International Bar Association. Int'l and Comp. L. Q. **5**: 129–31, '56.

The Committee on international and foreign law, Report of. Chi. Bar Record **37**: 412–15, '56.

Dihigo, Ernesto: Inter-American Academy of Comparative and International Law. (in: Int.-Am. Bar Assoc. 9th Conf. Proc., Dallas, 1956. p. 144–48.)

Faidherbe, A. J.: The French federation of Catholic groups in the law courts. Cath. Lawyer **2**: 56–60, '56.

France. Le Centre de Hautes Études Administratives (Centre of Higher Administrative Studies). Int'l Soc. Sci. Bull. **8**: 309–11, '56.

Hamson, C. J.: The Istanbul conference of 1955. Int'l & Comp. L. Q. **5**: 26–39, '56.

Hamson, C. J.: The Istanbul conference, September 1955. Preliminary report. Annales de la Faculté de Droit d'Istanbul **6**: 3–10, '56.

Inter-American Bar Association. Minutes of the . . . council meetings. Resolutions. (In: Int.-Am. Bar Assoc. 9th Conf. Proc., Dallas. 1956. p. 227–304.)

The International Commission of Jurists. L. T. **221**: 281–82, '56.

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Nadelmann, K. H.: The *Institut de Droit International* and American private international law. Am. J. Comp. L. **5**: 617–24, '56.

Nicolajević, B. D.: The Dubrovnik conference of the International Law Association. New Yugoslav L. No. **3**: 85–88, '56.

Reese, W. L. M.: Some observations on the eighth session of The Hague conference on private international law. Am. J. Comp. L. **5**: 611–16, '56.

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Sastri, M. Panajali: The First International Congress of Comparative Law. Ind. Y. B. Int'l Aff. **5**: 378–85, '56.

Sarraute, R.: The proceedings of the Commission of Private International Law at the 6th Congress of the *Association Internationale des Juristes Démocrates*. J. du Droit Int'l **83**: 887–897, '56.

Sipkov, Ivan: Academy of Sciences (Bulgaria). Highlights **4**: 187–200, '56.

Stosić B. D.: Second congress of Yugoslav jurists scheduled. New Yugoslav L. 7. No. **3**: 84–85, '56.

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Abernethy, G. L.: Pakistan. A selected, annotated bibliography. New York, 1957. 29 p.

American Institute of Pacific Relations. China. A selected list of references. New York, 1957. 23 p.

Bayitch, S. A.: Guide to Inter-American legal studies; a selective bibliography of works in English. Coral Gables, 1957. 297 p.

Handbook of Latin-American Studies. No. 19. Gainesville, 1957. 420 p.

Reinikainen, Veikko: English, French and German literature on Finnish law in 1860–1956. Helsinki, 1957. 179 p. (Library of the Parliament.)

Sipkov, Ivan: Legal sources and bibliography of Bulgaria. New York, 1956. 199 p. (Mid-European Law Project. Gen. ed. V. Gsovski.) This bibliography first gives a general survey and a description of the Bulgarian system of legal sources (Pt. 1 & 2). Pt. 3 contains the bibliography of the sources, Pt. 4 of legal periodicals, Pt. 5 a selective list of books and articles in Bulgarian grouped by subjects, Pt. 6 a bibliography of books and articles in foreign languages, Pt. 7 a list of principal legislative enactments of the People's Republic in effect as of January 1, 1956.

Unesco. A register of legal documentation of the world. 2 ed. rev. and enl. prepared by the International Association of Legal Science and the International Committee for Social Sciences Documentation. Paris, 1957. 424 p. This is a revised and much improved edition containing a list of the principal codes and laws, collection of laws and reports, centers of legal studies and libraries, a selective list of legal periodicals grouped according to countries.

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Weidlund, Jane; Stokes, Sybil L. and Heady, Ferel: Comparative public administration; a selective annotated bibliography. Ann Arbor, 1957. 78 p.

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Wepsiec, Jan: Polish national and local government serial publications on legislation and administration published in 1955. Highlights **4:** 333–43, '56.

Zink, Harold: Selected materials for a comparative study of local government. Am. Pol. Sci. Rev. **50:** 1107–33, '56.

4. COMPARATIVE LAW AND LEGAL EDUCATION

Books:

Brown, B. F.: A consideration of systems of law school examinations in the Americas: A comparative study. (In: Int.-Am. Bar Assoc. 9th Conf. Proc., Dallas, 1956. p. 148–53).

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Dainow, Joseph: Exchange opportunities for American and foreign law teachers. J. Legal Educ. **9:** 57–65, '56.

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Stone, F. F.: The role of Roman law in teaching law comparatively. Butterworths S. Afr. L. Rev. 1956. 119–126.

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Woodruff, J. S.: The Japanese lawyer. Nebr. L. Rev. **35:** 429–56, '56.

5. CODIFICATION OF LAW

Articles:

Akzin, Benjamin: Codification in a new state. A case study of Israel. Am. J. Comp. L. **5:** 44–77, '56.

Drobnig, Ulrich: Conflict of laws in recent East-European treaties. Am. J. Comp. L. **5:** 487–97, '56.

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